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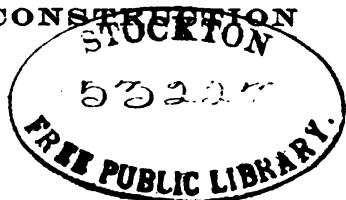
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**THE
CONSTITUTION
OF THE
UNITED STATES**

**ITS HISTORY
APPLICATION AND CONSTRUCTION**



BY

**DAVID K. WATSON, LL.B., LL.D.
OF THE COLUMBUS, OHIO, BAR**

—
IN TWO VOLUMES
—

VOLUME II

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CONTENTS

VOLUME II

CHAPTER XXXVI.

Pages.

The Executive (continued)—The President to be Commander in Chief of the Army, Navy and Militia, when Called into Active Service—May Require Opinions in Writing of Executive Officers—May Grant Reprieves and Pardons for All Offenses except Impeachments	911-947
--	---------

CHAPTER XXXVII.

The Executive (continued)—The President to Make Treaties with Consent of the Senate—Shall Appoint Ambassadors, Consuls, Judges and Other Officers—Appointment of Inferior Officers, where Vested—President's Power to Remove from Office	948-987
--	---------

CHAPTER XXXVIII.

The Executive (continued)—The President May Fill Vacancies during Recess of Senate—Expiration of Such Appointments—What is a Recess—The President Shall Give Congress Information on the State of the Union—May convene Congress on Extraordinary Occasions—Shall Receive Ambassadors and Public Ministers—Shall See that the Laws Are Faithfully Executed, and Shall Commission All Officers of the United States	988-1011
--	----------

CHAPTER XXXIX.

The Executive (continued)—Is the President Subject to Legal Process—The President, Vice-President, and Other Civil Officers, when Removable from Office	1012-1038
---	-----------

CHAPTER XL.

	<i>Pages.</i>
A National Judiciary Prior to the Federal Constitution	1039-1049

CHAPTER XLI.

Judicial Power, where Vested—What are Inferior Courts—Tenure of Judicial Office—Abolition of Inferior Courts—Compensation of Judges—Judicial Power Extends to Cases in Law or Equity	1050-1092
--	-----------

CHAPTER XLII.

The Judicial Power (continued)—Judicial Power Extends to All Cases Arising under the Constitution, the Laws of the United States and under Treaties, to Cases Affecting Ambassadors or Other Public Ministers, to Cases of Admiralty—To Controversies to which the United States is a Party; between States; between a State and Citizens of Another State; between a State and Foreign States, or Citizens or Subjects—Original Jurisdiction of Supreme Court—Appellate Jurisdiction	1093-1133
---	-----------

CHAPTER XLIII.

The Judicial Power (continued)—Trial of Criminal Cases Shall be by Jury—Where Trial to be Held—Definition of Treason—Two Witnesses or Confession in Open Court Necessary to Convict in Case of Treason	1134-1167
--	-----------

CHAPTER XLIV.

Power of Judiciary to Declare Legislation Unconstitutional	1168-1192
--	-----------

CHAPTER XLV.

Full Faith and Credit	1193-1221
---------------------------------	-----------

CHAPTER XLVI.

Surrender of Fugitives	1222-1244
----------------------------------	-----------

CONTENTS.

v

CHAPTER XLVII.

	<i>Pages.</i>
Admission of New States	1245-1281

CHAPTER XLVIII.

Guarantee of a Republican Form of Government to Every State	1282-1321
--	-----------

CHAPTER XLIX.

Prior Debts and Engagements—Supreme Law of the Land —Oaths of Members of Congress—Ratification.	1322-1350
--	-----------

CHAPTER L.

History of the First Ten Amendments.....	1351-1370
--	-----------

CHAPTER LI.

First Amendment—Establishment of Religion—Judicial Definitions Respecting Establishment of Religion— Religion Cannot Be Made a Defense for Crime—Con- gress Cannot Abridge the Freedom of Speech or of the Press—The Right of the People to Assemble and Peti- tion the Government	1371-1407
---	-----------

CHAPTER LII.

Second, Third and Fourth Amendments—The Right to Bear Arms—Quartering of Soldiers—Security of the People against Unreasonable Searches and Seizures— Warrants, how to Issue	1408-1430
--	-----------

CHAPTER LIII.

Fifth Amendment—No Person to Answer for an Infamous Crime unless on Presentment or Indictment, except in Land or Naval Forces, or in the Militia—Exceptions— No One to Be Placed Twice in Jeopardy; nor to Be a Witness against Himself in a Criminal Case; how Far This Privilege Extends—No One Shall Be Deprived of	
---	--

	<i>Pages.</i>
Life, Liberty or Property but by Due Process of Law —What Is Due Process of Law—Private Property not to Be Taken for Public Use, without Just Compensation	1431–1471

CHAPTER LIV.

Sixth Amendment—In Criminal Cases the Accused Shall Have Speedy and Public Trial—Jury Shall Be Impar- tial—Accused to Be Informed of the Nature and Cause of the Accusation; to Be Confronted with the Witnesses against Him; to Have Compulsory Process for Obtain- ing His Witnesses and the Assistance of Coun- sel	1472–1489
--	-----------

CHAPTER LV.

Seventh Amendment—The Right of Trial by Jury at Com- mon Law—Facts Tried by a Jury, how Re-examined in Courts of the United States	1490–1504
--	-----------

CHAPTER LVI.

Eighth Amendment—Excessive Bail Shall not Be Required, nor Excessive Fines Imposed, nor Cruel nor Unusual Punishments Inflicted—What is Excessive Bail or an Excessive Fine—What Are Not Cruel nor Unusual Punishments—What Are Cruel or Unusual Punish- ments	1505–1522
---	-----------

CHAPTER LVII.

Ninth, Tenth and Eleventh Amendments—Origin of the Ninth Amendment—Powers Reserved to the States or to the People—Judicial Power of the United States, to What it Extends	1523–1552
--	-----------

CHAPTER LVIII.

Twelfth Amendment—Votes of the Electors for President and Vice-President—How They Shall Vote—Trans- mission of Lists to Seat of Government—Opening of	
---	--

	<i>Pages.</i>
the Certificates—Counting the Votes—When House of Representatives Chooses the President—Vote Taken by States—Each State Has One Vote—Quorum of the House—When Vice-President Shall Act as President—Who to Be Vice-President—When Senate Elects Vice-President—Quorum of the Senate.....	1553-1581

CHAPTER LIX.

Thirteenth Amendment—History of the Amendment—Abolished Slavery in the United States and in Places Subject to Their Jurisdiction—Involuntary Servitude—Enforcement of the Amendment	1582-1593
---	-----------

CHAPTER LX.

Fourteenth Amendment—History of the Amendment—Persons Born or Naturalized in the United States, or Subject to the Jurisdiction Thereof—States not to Abridge the Privileges and Immunities of Citizens of the United States	1594-1623
---	-----------

CHAPTER LXI.

Fourteenth Amendment (continued)—No State Shall Deprive Any Person of Life, Liberty or Property without Due Process of Law; nor Deny to Any Person the Equal Protection of the Laws—Apportionment of Representatives—Basis of Representation, when and how it shall be Reduced—Who Cannot be a Senator or Representative, or Hold Any Office under the United States, or Any State—Certain Debts not to Be Paid by the United States or Any State—Enforcement of the Amendment	1624-1666
--	-----------

CHAPTER LXII.

Fifteenth Amendment—Protection of Citizens in Their Right of Suffrage—Suffrage not to Be Denied by Any State, by Reason of Race, Color or Previous Condition	
--	--

	<i>Pages.</i>
of Servitude—The Amendment Did not Confer the Right of Suffrage—Created a New Constitutional Right, viz., Exemption from Discrimination on Account of Race, Color, or Previous Condition of Servitude—Eliminated the Word “White” from the Constitution—Enforcement of the Amendment.....	1667–1679

APPENDICES

APPENDIX No. 1.

Declaration of Rights	1680–1683
-----------------------------	-----------

APPENDIX No. 2.

Articles of Confederation and Perpetual Union Submitted to the Second Colonial Congress by Benjamin Franklin, July 21, 1775.....	1684–1687
--	-----------

APPENDIX No. 3.

Articles of Confederation.....	1688–1698
--------------------------------	-----------

APPENDIX No. 4.

Plan of a Constitution Submitted to the Convention by Mr. Randolph, Governor of Virginia.....	1699–1701
---	-----------

APPENDIX No. 5.

Plan of a Constitution Submitted to the Convention by Mr. Charles Pinckney.....	1702–1709
---	-----------

APPENDIX No. 6.

Plan of a Constitution Submitted to the Convention by Mr. William Paterson.....	1709–1712
---	-----------

APPENDIX No. 7.

Plan of a Constitution Submitted to the Convention by Alexander Hamilton, Near its Close	1712–1726
--	-----------

APPENDIX No. 8.

	<i>Pages.</i>
Speech of Mr. Hamilton, Made in the Convention When Submitting His Plan of a Constitution.....	1726-1737

APPENDIX No. 9.

Report of the Committee of the Whole to the Convention	1737-1740
--	-----------

APPENDIX No. 10.

Resolutions Adopted by the Convention and Referred to the Committee of Detail.....	1740-1744
---	-----------

APPENDIX No. 11.

Report of Committee of Detail, August 6, 1787.....	1744-1757
--	-----------

APPENDIX No. 12.

Constitution of the United States.....	1757-1771
--	-----------

APPENDIX No. 13.

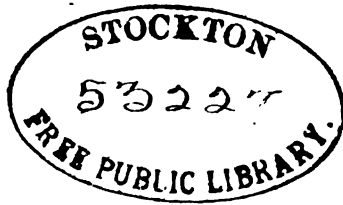
Resolutions Adopted by the Constitutional Convention, Di- recting that the Constitution Be Submitted to Con- gress—President Washington's Letter Transmitting the Constitution to Congress	1771-1773
---	-----------

APPENDIX No. 14.

Amendments to the Constitution.....	1774-1778
-------------------------------------	-----------

APPENDIX No. 15.

Additional Cases Relating to Treason to a State....	1778-1779
---	-----------



CONSTITUTION OF THE UNITED STATES

VOLUME II.

CHAPTER XXXVI.

THE EXECUTIVE—COMMANDER IN CHIEF—OPINION IN WRITING—REPRIEVES AND PARDONS.

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the Executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

"The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the United States," was the language of Mr. Pinckney's plan of a Constitution.¹

Mr. Paterson's plan read: "That the Executive ought to direct all military operations; provided, that none of the persons composing the Federal Executive should, on any occasion, take command of any troops, so as personally to conduct any military enterprise, as general, or in any other capacity."²

The Committee of Detail reported, "The President shall

¹ Journal, 70.

² Journal, 165.

be Commander in Chief of the Army and Navy of the United States and of the militia of the several States.”^s

The Power of the President as Commander in Chief.—

It is somewhat singular that the Constitution of a Republic whose President—it could have reasonably been presumed—would be selected from the peaceful vocations of life—without military or naval training—should make its President Commander-in-Chief of the military and naval forces of the country. But there was no opposition to this provision in the Convention which framed the Constitution. This action of the Convention was probably due to some particular cause, and none seems more reasonable than the fact that during the Revolution Washington experienced great trouble and embarrassment resulting from the failure of Congress to support him with firmness and dispatch. There was a want of directness in the management of affairs during that period which was attributable to the absence of centralized authority to command. The members of the Convention knew this and probably thought they could prevent its recurrence by making the President Commander-in-Chief of the Army and Navy. Doubtless, also, the Convention was influenced by precedents, of which there were many, running back for a long period.

The Plan of Union formed by William Penn in 1696, made the King’s commissioner to be general or chief-commander of the several quotas upon service against the common enemy.

In 1732, the Governor and Commander-in-Chief of South Carolina had the chief command of the militia of that province. When the State constitutions were adopted more than a century afterwards, several of them made the Governor commander-in-chief of the militia and military forces of the States.

The Constitution of Georgia, adopted in 1777, made the Governor captain-general and commander-in-chief over all the militia and other military and naval forces of the State, and the Constitution of New York, adopted the same year, contained a clause that “the Governor shall, by virtue of his office, be general and commander-in-chief of all the militia and admiral of the navy of this State.”

^s Journal, 457.

The Constitutions of New York and Georgia were the first that expressly made a Governor commander of the naval as well as of the military forces of a State.⁴

There is also a clause in the Ordinance for the government of the Northwest Territory, making the Governor commander-in-chief of the militia and authorizing him to appoint and commission all officers below the rank of general officers.

The power of the President under this clause is commonly called the "War Power" of the President. It is an immense power to exercise and might be used in a most dangerous manner by an unwise Executive, as there

⁴ Fisher's Evolution of the Constitution, 158.

In the United States Senate, Senator Bacon gave the following reasons why the Constitution makes the President Commander-in-Chief.

"The President is an Executive. Upon him devolves the execution of the law and the enforcement of the law; and the enforcement of the law must necessarily be, in its last analysis, through the military arm. Of course the President can not be the Supreme Executive unless he has the supreme command of that through which the execution of the law must be enforced. The civil authority is supreme, and the military authority is subject to the order of the civil authority and executes its orders. Here is an order from the court; the *posse comitatus* is summoned for the purpose of executing the mandate of the court, but is unable to do it by reason of superior force opposed to it, and finally it must appeal to the Executive to use the military arm to carry out the order of the court. That is what I mean by saying that, in the last analysis, the military arm is that by which the law is executed or must be executed." Congressional Record, February 17, 1909.

It was under his authority as Commander-in-Chief of the Army and Navy, that President Lincoln issued his Emancipation Proclamation which abolished slavery in the United States. The proclamation read, "By virtue of the power vested in me as Commander-in-Chief of the Army and Navy of the United States in times of actual armed rebellion against the authority and government of the United States."

Ex-President John Quincy Adams claimed the existence of this power in the President as Commander-in-Chief, more than a quarter of a century before Mr. Lincoln's proclamation. In a speech delivered in 1836 he said, "From the instant your slave-holding states become the theatre of war, civil, servile or foreign, from that instant the war powers of the Constitution extend to interference with the institution of slavery in every way in which it can be interfered with." In 1842 he again said, "Whether the war be servile, civil or foreign I lay this down as the law of nations. I say that the military authority takes for the time the place of all municipal institutions, slavery among the rest. Under that state of things, so far from its being true that the states where slavery exists have the exclusive management of the

does not seem to be any limitation prescribed by the Constitution to the exercise of the power by the President in the field of military operations.

By this clause he is made commander of the military and naval forces of the United States, for the whole time that he is President. No other department of the government, and no other officer of the government can exercise this power or assume to command either the Army or the Navy, unless designated by the President to do so. Congress can legislate relative to the number of the Army or the Navy, the compensation of the officers and men, and the term of their service, as well as many other matters, but the command of the Army and Navy is vested in the President, and Congress can neither command them or take that power from the President.

The power is vested in the President to dispose of or arrange the component parts of the Army and Navy at his pleasure. In practice he does this through the military and naval departments of the government, but their action is his action. While Congress can make rules for the Army and Navy, it can not interfere with the President's power as commander of such forces. The line between the exercise of his power as commander and that of Congress is plain, and neither can rightfully or legally invade the other.

This line of demarkation was well defined by Chief Justice Chase and the dissenting justices in the *Milligan* case, where it was said:

"Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our

subject, not only the President of the United States, but the Commander of the Army has power to order the universal emancipation of the slaves." *Morse's Life of John Quincy Adams*, 261-264.

institutions. The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress can not direct the conduct of campaigns; nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the legislature."⁵

"The Army Regulations derive their force from the power of the President as Commander-in-Chief, and are binding upon all within the sphere of his legal and constitutional authority."⁶

How far such orders and regulations in time of peace, and without the consent of Congress, would confer authority upon civil authorities, does not seem to be settled by judicial construction. They do not authorize civilians to arrest or detain deserters from the Army, and neither a civilian nor a police officer can arrest a deserter without authority to do so. The authority of the President over the Army and Navy to command and control is only subject to the restrictions of Congress "to make rules for the government and regulation of the land and naval forces," and that the appointment "of officers should be by and with the advice and consent of the Senate."⁷ The power of Congress, and that of the President over the Army and Navy are separate and distinct, neither can impair or invade the authority of the other.⁸ The powers of the President under this clause are only those which may be called "military." He can direct the movements of the Army and Navy so as to injure the

⁵ Ex parte Milligan, 4 Wallace, 2, 139, 140.

⁶ Kurtz v. Moffit, 115 U. S., 503.

⁷ Street v. United States, 24 Court of Claims, 230, 247.

⁸ Swain v. United States, 28 Court of Claims, 173, 221.

enemy in the most effective way, and to do this may order an invasion of the enemy's country, and if possible establish the authority of the United States over it, but such policy would not enlarge the boundaries of the United States nor extend our institutions outside the jurisdiction previously conferred upon them by Congress.⁹

The President as Commander-in-Chief has power to form a temporary government for a conquered country, and to impose duties on imports and tonnage for the support of the government and to aid in sustaining the burdens of the war.

So as such Commander he has power to organize a provisional court in territory taken from the enemy during a foreign or a civil war.¹⁰ It was within his power as Commander-in-Chief, to order the collection of duties on goods shipped from a domestic port to Porto Rico from the time of taking possession of that island until the establishment of business relations between the belligerent countries.¹¹

The President, under his power as Commander-in-Chief, may employ secret agents to obtain information from the enemy concerning their position, resources and general condition.¹²

President Roosevelt, in the exercise of this power, dismissed three companies of United States troops for supposed unsoldierly conduct. The order of dismissal provided "that they will be discharged without honor from the Army by their respective commanding officers and forever debarred from re-enlisting in the Army or Navy of the United States as well as from employment in any civil capacity under the government."¹³ The power of the President to make an order preventing soldiers discharged without honor from being employed in any civil capacity under the government was challenged as beyond his constitutional authority, and he thereupon revoked that part of the order and frankly admitted that it was beyond

⁹ *Fleming v. Page*, 9 Howard, 603-615; *Cross v. Harrison*, 16 Howard, 190; *Leitensdorfer v. Webb*, 20 Howard, 176; *The Grape Shot*, 9 Wall., 129.

¹⁰ *Grapeshot*, 9 Wall., 133; *Mechanics' Bank v. Union Bank*, 22 Wall., 276.

¹¹ *Dooley v. United States*, 182 U. S., 222.

¹² *Totten v. United States*, 92 U. S., 106.

¹³ Special Order No. 266.

his authority to make. Whether he had the power to prevent the soldiers from re-enlisting without their guilt being first determined according to law is unsettled, and is questionable.

When William H. Seward was Secretary of State he sent a note to Lord Lyons in 1861 in which he set forth the power of the President as Commander-in-Chief, as follows:

"It seems necessary to state that Congress is by the Constitution invested with no executive power or responsibility whatever, but on the contrary the President of the United States is, by the Constitution and laws, invested with the whole executive power of the government, and charged with the supreme direction of all ministerial agents as well as of the whole land and naval forces of the United States, and that invested with these ample powers, he is charged by the Constitution and laws with the absolute duty of suppressing insurrection, as well as of preventing and repelling invasion, and that for these purposes he constitutionally exercises the right of suspending the writ of *habeas corpus* whenever and wheresoever and in whatsoever extent the public safety, endangered by treason or invasion in arms, in his judgment requires.

"If it be said that these acts of the President in time of war are unconstitutional, the answer is, that as Commander-in-Chief of the Army and Navy the President has the constitutional power to employ the means recognized by the laws of war as necessary to conquer the enemy.

"Congress can pass no law which can deprive the President of the power conferred in creating him Commander-in-Chief."¹⁴

There are, however, certain limitations upon the power of the President as Commander-in-Chief. He has no authority to establish a court during a war in a conquered country and empower it to pass upon the rights of the government or individuals in prize cases, nor to administer the laws common among nations, and the judgments of such courts would be a nullity.¹⁵

¹⁴ Woodburn's American Republic, 181; 14 Fed. Cases, No. 8006, p. 976.

¹⁵ In the Civil War President Lincoln issued the following order establishing a "Provisional Court" in Louisiana:

The President has no authority under his power as Commander-in-Chief to detain for trial before a court-martial, or military tribunal, or to restrain for an unreasonable period private citizens, while the civil courts are accessible, except in case of insurrection, or actual war, when he can exercise such power and delegate it to his subordinate officers.

No President, under the authority conferred upon him

"Executive Mansion, Washington, October 20th, 1862.

"The insurrection which has for some time prevailed in several of the States of this Union, including Louisiana, having temporarily subverted and swept away the civil institutions of that State, including the judiciary and judicial authorities of the Union, so that it has become necessary to hold the State in military occupation, and it being indispensably necessary that there should be some judicial tribunal existing there capable of administering justice, I have, therefore, thought it proper to appoint, and I do hereby constitute a provisional court, which shall be a court of record for the State of Louisiana, and I do hereby appoint Charles A. Peabody, of New York, to be a provisional judge, to hold said court, with authority to hear, try and determine all causes, civil and criminal, including causes in law, equity, revenue and admiralty, and particularly all such powers and jurisdiction as belong to the district and circuit courts of the United States, conforming his proceedings, so far as possible, to the course of proceedings and practice which has been customary in the courts of the United States in Louisiana; his judgments to be final and conclusive. And I do hereby authorize and empower the said judge to make and establish such rules and regulations as may be necessary for the exercise of his jurisdiction, and to appoint a prosecuting attorney, marshal and clerk of the said court, who shall perform the functions of attorney, marshal and clerk, according to such proceedings and practice as before mentioned and such rules and regulations as may be made and established by said judge. These appointments are to continue during the pleasure of the President, not extending beyond the military occupation of the city of New Orleans, or the restoration of the civil authority in that city and the State of Louisiana. These officers shall be paid out of the contingent fund of the War Department, compensations as follows: The judge at the rate of \$3500 per annum; the prosecuting attorney, including the fees, at the rate of \$3000 per annum; and the clerk, including the fees, at the rate of \$2500 per annum; such compensation to be certified by the Secretary of War. A copy of this order, certified by the Secretary of War and delivered to such judge, shall be deemed and held to be a sufficient commission.

"Let the seal of the United States be hereunto affixed.

(L. S.)

"ABRAHAM LINCOLN.

"By the President:

"William H. Seward,

"Secretary of State."—(22 Wallace, 279).

by this clause, has ever assumed to take the active command of the military and naval forces of the government in time of war, and while it is probable that he would have that power, it is by no means certain. There are other clauses of the Constitution which impose duties upon the President and these become very onerous and numerous and important, especially in time of war. He is required to nominate and, with the advice and consent of the Senate, appoint ambassadors and other public ministers and consuls, judges of the Supreme Court and all other officers of the United States, whose appointments are not otherwise provided for. The Constitution also makes it his express duty to receive ambassadors and other public ministers, and "he shall take care," says the Constitution, "that the laws be faithfully executed, and shall commission all the officers of the United States." The question arises, how would the President be able to execute these duties, solemnly imposed upon him by the Constitution, should he assume the active command of the Army and Navy? The command of the active forces, during war, would necessarily require him to be on the march, in the camp, and on the battlefield or on the high seas, and consequently cause his absence from the seat of government for a long period of time. He might be compelled to establish his military headquarters far from the seat of government and of national legislation. If he should undertake to command the military and naval forces of the government in time of war, he would be exercising a power which would necessarily prevent him from executing important duties required of him by the Constitution.

How he could be restrained from the exercise of the command, if he should insist upon exercising it, would be difficult to determine, and it might be that he could not be prevented, but such a course would certainly impair his usefulness and effectiveness as the head of the government in discharging many other duties directly imposed upon him. It was probably the fear that such a contingency might arise, that induced Mr. Paterson, as we have already seen, to insert in his plan of a constitution, that the "Executive should, on no occasion, take command of any troops or conduct per-

sonally any military enterprise, as general or in any other capacity.'"¹⁶

The militia of the several States, when called into the actual Service of the United States.

The report of the Committee of Detail made the President the absolute commander of the militia of the States, the same as it did of the Army and Navy.

Mr. Sherman moved to amend the report by adding, "when called into the service of the United States," and it was carried by six States to three.¹⁷

The militia consists of every able-bodied male citizen of the respective States, Territories and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age.

¹⁶ Journal, 165.

It was doubtless the same feeling which influenced the New York Convention to suggest as a constitutional amendment, "That the President of the United States should never command the army, militia, or navy of the United States, in person, without the consent of the Congress." Elliot, vol. 2, 408.

"The power of the President as Commander-in-Chief of the Army and Navy has in practice never been exercised by the President's taking immediate command of the Army or the Navy during the existence of actual hostilities; so that, in that sense, no President has ever been Commander-in-Chief when the Army immediately confronted an enemy. Such authority as the President has exercised under this constitutional provision has been almost exclusively through the Secretary of War and the Secretary of the Navy, offices created among others by an act of the first session of the Congress, which distributed the exercise of the executive functions among several departments, at the head of each of which was placed a minister, called usually a 'Secretary.' And so strong and prominent to the public eye has been the control of these secretaries in the operations of the Army and Navy, in the few wars of an important character which we have had during the existence of the government, that the influence of the President in the actual movements of the Army and Navy has been hardly perceptible. Whether in case a war should occur during a period when the incumbent of the executive office is a man who has had experience in the command of armies, and with a good military reputation, it would be judicious for him to place himself at the head of the army, or to conduct its campaigns, or to be present and directing in battle, or whether public sentiment would tolerate such a course of action, is extremely doubtful."—Miller on the Constitution, 162.

¹⁷ Journal, 613.

The command of the President over the militia is limited to the time during which it is called into the service of the United States; but as to the Army and Navy, he is Commander-in-Chief at all times.¹⁸

The President is forbidden to appoint the officers of the militia or to train the militia, these powers being reserved to the States exclusively;¹⁹ though he can call out the militia in case of invasion by a foreign enemy, or to suppress a domestic insurrection.²⁰

While this section makes the President commander of the militia of the several States when called into the service of the United States, it omits to confer in express terms upon him, or any one else, the right to determine when the militia of the several States shall be so called. It became a serious question during the second war with England where this power resided, and the Governor of Massachusetts asked the opinion of the supreme court of that State, first: "Whether the commanders in chief of the militia of the several States have a right to determine whether any of the exigencies contemplated by the Constitution of the *United States* exist, so as to require them to place the militia, or any part of it, in the service of the *United States*, at the request of the President, to be commanded by him, pursuant to the acts of Congress?" Second, "Whether, when either of the exigencies exists authorizing the employing of the militia in the service of the *United States*, the militia thus employed can be lawfully commanded by any officers but of the militia, except by the President of the *United States*?"

On the first question three justices of the supreme court—being all that were accessible—decided that "the right was vested in the commanders in chief of the several States." On the other question they held, "The federal Constitution provides that when either of these exigencies exists the militia may be employed, pursuant to some act of Congress, in the service of the *United States*; but no power is given, either to the President or to the Congress, to determine that either of the said exigencies does in

¹⁸ *Johnson v. Sayre*, 158 U. S., 115.

¹⁹ Art. 4, Sec. 8, Cls. 16.

²⁰ *The Brig Amy Warwick*, 2 Black., 668.

fact exist. As this power is not delegated to the *United States* by the federal Constitution, nor prohibited by it to the States, it is reserved to the States respectively; and from the nature of the power, it must be exercised by those, with whom the States have respectively entrusted the chief command of the militia. It is the duty of these commanders to execute this important trust agreeably to the laws of their several States respectively, without reference to the laws or officers of the *United States*, in all cases, except those specially provided for in the federal Constitution. They must, therefore, determine when either of the special cases exists, obliging them to relinquish the execution of this trust, and to render themselves and the militia subject to the command of the President."²¹

In some other States it was held the same.²²

But the Supreme Court of the United States declared that it was in the power of the President exclusively to determine when the exigencies of calling out the militia should arise.²³ The language of Mr. Justice Story in delivering the opinion of the court is: "Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered an open question to every officer to whom the orders are addressed to decide for himself, and equally open to be contested by every militiaman who has refused to obey the orders of the President? We are all of the opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President and his decision is conclusive upon all other persons."²⁴

²¹ 8 Mass., 548-552.

²² This doctrine was subsequently abandoned by the states holding it. Story on the Constitution, vol. 2, p. 122.

²³ *Houston v. Moore*, 5 Wheaton, 37; *Martin v. Mott*, 12 Wheaton, 30.

The New York convention in 1788 recommended as an amendment to the Constitution that, "The militia of any State should not be marched out of the State without the consent of the executive thereof, nor be continued in service out of the State without the consent of the legislature of the State, more than six weeks, and that the power to organize, arm and discipline the militia, shall not be construed to extend further than to prescribe the mode of arming and disciplining the same." 2 Elliot, 406.

²⁴ Congress has recently passed the following law on the power of the President to call out the militia:

The President may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.

Hamilton said that he "considered this a mere redundancy in the matter."²⁵ The term "principal officer" is equivalent to the head of a department.²⁶

"Heads of the departments," said Attorney-General Cushing, "have a threefold relation, namely: 1. To the President, whose political or confidential ministers they are, to execute his will, or rather to act in his name and by his constitutional authority, in cases in which the President possesses a constitutional or legal discretion. 2. To the law; for where the law has directed them to perform certain acts, and where rights of individuals are dependent on those acts, then in such cases a head of department is an officer of the law, and amenable to the laws for his conduct (*Marbury v. Madison*, 1 Cranch, 49-61). 3. To Congress, in the conditions contemplated by the Constitution. This later relation, that of the departments to Congress, is one of the great elements of responsibility and legality in their action. They are created by law; most of their duties are prescribed by law; Congress may at all times call on them for information or explanation in matters of official duty, and it may, if it sees fit, interpose by legislation concerning them, when required by the interests of the Government."²⁷

No provision in the Constitution more clearly manifests the intention of the framers of that instrument to confer

"Whenever the United States is invaded or in danger of invasion from any foreign nation, or of rebellion against the authority of the Government of the United States, or the President is unable, with the other forces at his command to execute the laws of the Union in any part thereof, it shall be lawful for the President to call forth, for a period not exceeding nine months, such number of the militia of the States, or of the Territories or of the District of Columbia as he may deem necessary to repel such invasion, suppress such rebellion or to enable him to execute such laws, and to issue his orders for that purpose to such officers of the militia as he may think proper."—32 Stat. L., 776.

²⁵ The Federalist, No. 74.

²⁶ *United States v. Germaine*, 99 U. S., 511.

²⁷ 6 Op. A. G., 344.

great power upon the President and make him the strong, controlling and dominating influence in the Government than this.

So supreme and absolute was to be his control that it was not contemplated he should consult his "principal executive officers" in a body, on matters pertaining to national affairs, but he might, if he chose, require the opinion in writing from each of them on any subject relating to the duties of their respective offices.

The view taken by the Constitutional Convention of the official duties of the President and his relations to the principal officer in each of the executive departments was stated by Mr. Pinckney in his memorable speech delivered in the Convention, in which he said: "In our government the Executive can not be clothed with those authorities the chief magistrate of a government often possesses; because they are vested in the legislature and can not be used or delegated by them in any but the specified mode. Under the new system it will be found essentially necessary to have the executive distinct. His duties will be to attend to the execution of the acts of Congress by the several States; to correspond with them upon the subject; to prepare and digest in concert with the great departments such business as will come before the legislature at their stated sessions; to acquire from time to time as perfect a knowledge of the situation of the Union, as he possibly can, and to be charged with all the business of the home department. He will be empowered, whenever he conceives it necessary, to inspect the departments of foreign affairs, of war, of treasury, and when instituted, of the admiralty. This inspection into the conduct of the departments will operate as a check upon those officers, keep them attentive to their duty, and may be the means in time not only of preventing and correcting errors, but of detecting and punishing malpractices. He will have a right to consider the principals of these departments as his council, and to acquire their advice and assistance, whenever the duties of his office shall render it necessary. By this means our Government will possess what it has always wanted, but never yet had, a cabinet council, an institution essential in all governments, whose

situation or connections oblige them to have an intercourse with other powers.'"²⁸

The idea of a Cabinet, such as the American people have been familiar with, was never contemplated by the framers of the Constitution. We have already seen that the Convention declined to adopt the proposition of Mr. Morris and Mr. Pinckney for an advisory council to assist the President, which was a near approach to the Cabinet.

There is nothing in the proceedings of the Convention to warrant the conclusion that it was supposed the President would consult his advisers in a body. The word "Cabinet" does not appear in the Constitution, though that word was used in the beginning of the Government

²⁸ Moore's American Eloquence, vol. 1, 364.

Mr. Pinckney's expression, "Cabinet Council" was probably the first time the word "Cabinet" was used in the sense in which it has been employed since the early days of the Government.

Proof of the power which the Constitution conferred upon the President may be found in the Acts of Congress creating the early departments of the Government. The act creating the Department of Foreign Affairs, July 27, 1789, which was the first created and which was afterwards called the Department of State, provided, "There shall be a principal officer in said department to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or entrusted to him by the President of the United States, agreeable to the Constitution, etc., and the said principal officer shall conduct the business of said department in such manner as the President of the United States shall from time to time order or direct." The same provisions are found in the act creating the Department of War on August 7, 1789, and the Act of April 30, 1789, creating the Department of the Navy.

But the Act of September 2, 1789, creating the Treasury Department, did not contain such a provision, nor did it require the Secretary of the Treasury to be subject in any manner to the orders or directions of the President, but required that official to "make report, and give information to either branch of the legislature, in person or in writing as he may be required, respecting all matters referred to him, by the Senate or House of Representatives, or which shall pertain to his office."

President John Adams did not consider this act favorably and in referring to it said, "The office of the Secretary of the Treasury is, in that bill, premeditatedly set up as a rival to that of the President; and that policy will be pursued, if we are not on our guard, till we have a quintuple or centuple executive directory, with all the Babylonish dialect which modern pedants most affect."

Charles Francis Adams said of this act, "In the original organization of the Departments, a remarkable variation from the general system of accountability to the President has been made in the case of the

to represent a meeting attended by the President and the heads of the departments. It is quite clear that a provision creating a body of advisers like what is now understood as the Cabinet, could not have passed the Convention. Practically such an effort was made, but it failed.

Mr. Gouverneur Morris and Mr. Pinckney submitted a proposition, which was referred to the Committee of Detail, providing as follows: "To assist the President in conducting the public affairs, there shall be a Council of State composed of the following officers: 1, Chief Justice of the Supreme Court; 2, Secretary of Domestic Affairs; 3, Secretary of Commerce and Finance; 4, Secretary of Foreign Affairs; 5, Secretary of War; 6, Secretary of Marine. The President shall also appoint a Secretary of State, to hold his office during pleasure; who shall be secretary to the Council of State, and also public secretary to the President."

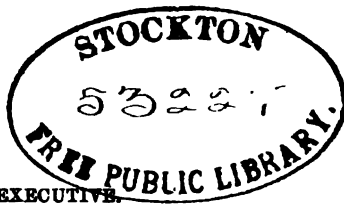
The resolution concluded: "The President may from time to time submit any matter to the discussion of the Council of State, and he may require the written opinions of any one or more of the members. But he shall in all cases exercise his own judgment, and either conform to such opinions or not, as he may think proper."²⁹

In this proposition is found the origin of the "Cabinet." The committee to which this resolution was referred reported the following as a substitute: "The President of the United States shall have a Privy Council, which shall consist of the President of the Senate, the Speaker of the House of Representatives, the Chief Justice of the Supreme Court, and the principal officer in the respective departments of foreign affairs, domestic affairs, war, marine and finance, as such departments of office shall, from time to time, be established; whose duty it shall be to advise him in matters respecting the execution of his office, which he shall think proper to lay before them; but their advice shall not conclude him nor affect his responsibility for the measures which he shall adopt."³⁰

Secretary of the Treasury, who has ever since made his reports directly to the legislature, and not under the supervision of the President." *Life and Writings of John Adams*, vol. 8, 555.

²⁹ Journal, 560, 561.

³⁰ Journal, 585.



Subsequently the Committee of Eleven reported in favor of the clause in the Constitution.³¹

At a later period Mr. Mason suggested that a Privy Council of six members to the President should be established, to be chosen for six years by the Senate, two from the Eastern, two from the Middle and two from the Southern quarters of the Union, and to go out in rotation, two every second year.³²

Mr. Wilson and others favored this plan, but it was defeated. Mr. Mason then changed the form of his motion so that it would read "that it be an instruction to the Committee of the States to prepare a clause for establishing an executive council as a Council of State for the President of the United States, to consist of six members, etc." This motion was seconded by Dr. Franklin. He said, "We seem too much to fear cabals in appointments by a member, and to have too much confidence in those of a single person. Experience showed that caprice, the intrigues of favorites and mistresses, were nevertheless the means most prevalent in monarchies. . . . He thought a council would not only be a check on a bad President, but relief to a good one."³³

The motion was also supported by Mr. Madison, Mr. Wilson and others, but was lost by a vote of three States to eight. The Convention repeatedly refused to establish a Council for the President's aid and adhered to the resolution as reported by the special committee and adopted by the Convention and which was inserted in the Constitution as the clause under consideration.

Washington established the practice in the early part of his administration of consulting the heads of the various departments separately, but subsequently consulted them as a body, and that practice continued.³⁴

³¹ Journal, 656.

³² Journal, 679.

³³ Journal, 683, 684.

³⁴ The following letter from Jefferson, written while he was President, is interesting and instructive:

"The ordinary business of every day is done by consultation between the President and the head of the department alone to which it belongs. For measures of importance or difficulty, a consultation is held with the heads of departments either assembled, or by taking their opinions separate in conversation or writing. The

The right of the President to require the opinion in writing of the principal officer of an executive depart-

ment is most strictly in the spirit of the Constitution. Because the President, on weighing the advice of all, is left free to make up an opinion for himself. In this way they are not brought together, and it is not necessarily known to any what opinion the others have given. This was General Washington's practice for two or three years of his administration, till the affairs of France and England threatened to embroil us, and rendered consideration and discussion desirable. . . . I practiced this last method because the harmony was so cordial among us all, that we never failed, by a contribution of mutual views on the subject, to form an opinion acceptable to the whole. . . . Yet this does, in fact, transform the executive into a directory and I hold the other method to be more constitutional. It is better calculated, too, to prevent collision and irritation and to cure it, or at least suppress its effects when it has already taken place." *Ford's Jefferson*, vol. 9, 273, 274.

Soon after Mr. Jefferson became President he addressed the following letter to the heads of the departments:

"Washington, November 6, 1801.

"Dear Sir:—Coming all of us into executive office, new, and unfamiliar with the course of business previously practiced, it was not to be expected we should, in the first outset, adopt in every part a line of proceeding so perfect as to admit no amendment. The mode and degrees of communication, particularly between the President and heads of departments, have not been practiced exactly on the same scale in all of them. Yet it would certainly be more safe and satisfactory for ourselves as well as the public, that not only the best, but also an uniform course of proceeding as to manner and degree should be observed. Having been a member of the first administration under Gen. Washington, I can state with exactness what our course then was. Letters of business came addressed sometimes to the President, but most frequently to the heads of departments. If addressed to himself, he referred them to the proper department to be acted on; if to one of the secretaries, the letter, if it required no answer, was requisite, the secretary of the department communicated the letter and his proposed answer to the President. Generally they were simply sent back after perusal, which signified his approbation. Sometimes he returned them with an informal note, suggesting an alteration or a query. If a doubt of any importance arose, he reserved it for conference. By this means, he was always in accurate possession of all facts and proceedings in every part of the Union, and to whatsoever department they related; he formed a central point for the different branches; preserved an unity of object and action among them; exercised that participation in the suggestion of affairs which his office made incumbent on him; and met himself the responsibility for whatever was done. During Mr. Adams' administration, his long and habitual absences from the seat of government rendered this kind of communication impracticable, removed him from any share in the

ment is now seldom exercised; with the exception of the Attorney-General, it is rather the custom of the President

transaction of affairs, and parcelled out the government, in fact, among four independent heads, drawing sometimes in opposite directions. That the former is preferable to the latter course cannot be doubted. It gave indeed to the heads of departments the labor of making up, once a day, a packet of all their communications for the perusal of the President; it commonly also retarded one day their despatches by mail. But in pressing cases, this injury was prevented by presenting that case singly for immediate attention; and it produced us in return the benefit of his sanction for every act we did. Whether any change of circumstances may render a change in this procedure necessary, a little experience will show us. But I cannot withhold recommending to heads of departments that we should adopt this course for the present, leaving any necessary modification of it to time and trial. . . . My sole motives are those before expressed, as governing the first administration in chalking out the rules of their proceeding; adding to them only a sense of obligation imposed on me by the public will, to meet personally the duties to which they have appointed me. If this mode of proceeding shall meet the approbation of the heads of departments, it may go into execution without giving them the trouble of an answer; if any other can be suggested which would answer our views and add less to their labors, that will be a sufficient reason for my preferring it to my own proposition, to the substance of which only, and not the form, I attach any importance." Ford's Jefferson, vol. 8, 99-101.

The following note concerning the practical administration of the presidential office, especially in relation to communications between the President and his Cabinet, and the President and the members of the Cabinet individually, affords much information on this interesting subject:

"The author once had a conversation with President Rutherford B. Hayes regarding the practical operation of the presidency. By his permission I made notes of the conversation at the time, for publication in this book. Asking about the action of a President independently of the advice of his Cabinet, he told me that he himself and other Presidents had so acted occasionally. As to the general relations of the Cabinet, he said that Presidents were masters of the situation, not only by law, but by the fact that cabinet officers were appointed by and dependent upon the Executive. He said the custom of the past had varied; that some Presidents had been more influenced by their Cabinets than others; that President Buchanan was much worried by his Cabinet, because not strong enough to insist on his own will. On the other hand, President Lincoln had decided on his emancipation proclamation without consulting his Cabinet, to whom he read it over merely for suggestion and amendment.

"He (President Hayes) had once decided a measure, overruling his Cabinet. He knew them to be opposed to it and did not ask their views, but announced his own policy and carried it out. In matters of a department, he gave greater weight to the opinion of the secretary of that department, if the secretary opposed his own views;

to send for such officer and consult him personally concerning matters pertaining to his department.

but on two occasions at least he had decided and carried out matters against the wishes of the secretary of the department affected. He had done so in the case of his Secretary of Treasury, whose opinion he usually valued. In each case, knowing the certainty of diverse views from the secretary, he had not asked those views, but had announced to the secretary his own policy and decision. In answer to a question of mine, as to whether the President or the secretaries usually *initiated* business at meetings of the Cabinet, he said that there was no uniform practice; but that every secretary was full of ideas as to his own department. When wishing to introduce a measure, the secretary usually consulted the President privately. If the President disfavored the proposed measure, it was of course dropped. In fact, no measures could succeed except by the President's own act in either introducing them or approving them.

"He remarked that few writers or public persons understood the real power of the American Executive. Practically, the President had the nation in his hand. He was Commander-in-Chief of the Army and Navy, and had control of foreign affairs. He could at any time force Congress into war with foreign powers. The complicated relations with foreign powers rendered this always easy. By law, Congress had the power to declare war, but the real power was with the Executive. He detailed some of his own experiences with foreign affairs in proof of the constant delicacy of such matters. But, said he, if once war exists, the President has the 'war powers,' and no man has defined what those are, or placed a limit on them. The executive power is large because not defined in the Constitution. The real test has never come, because the Presidents have down to the present been conservative, or what might be called conscientious men, and have kept within limited range. And there is an unwritten law of usage that has come to regulate an average administration. But if a Napoleon ever became President, he could make the executive almost what he wished to make it. The war power of President Lincoln went to lengths which could scarcely be surpassed in despotic principle.

"I reminded him that Mr. Bryce characterized this power of Lincoln as practically that of a dictator. President Hayes agreed with the description. He said the scope of this executive power had never been really realized, and that the practical use of power, even by an ordinarily strong President, was greater than the books ever described.

"He said that much of the legislation of Congress was ordinarily initiated by the President. The Constitution did not provide for this, but in practice it was done. A large part of legislation was first considered in Cabinet, and then started in Congress by contact privately between the secretaries and the committees of Congress. I remarked that Mr. Bryce had enlarged on the weakness of the contact between the President and Congress in the initiation of legis-

It has for a long period been the rule for the President to have regular "Cabinet days" in each week, and in addition "called" Cabinet meetings are of frequent occurrence. The Cabinet, as now understood, is the result of a long process of growth and development.³⁵

Neither the Constitution nor any law makes the head of a department a member of the President's Cabinet.

lation, and had especially pointed out that the presidential message had no necessary influence. He replied that the message was without legal force, and that Congress could be influenced by it or not as it saw fit; but that if one were to compare the messages with legislation, it would be found that legislation largely resulted from the suggestions of messages. Really, the message made a public statement of matters which, less officially, were pressed upon Congress by cabinet ministers, as already mentioned. While it was a fact that no regular channel of necessary legislative initiative was possessed by the President, he nevertheless did initiate a large proportion of, sometimes the leading, legislation of his administration. He had also a certain amount of influence in preventing in advance legislation that was distasteful to him, or even in shaping and amending bills in Congress, by intimating unofficially his disapproval and possible veto." Stevens, *Sources of the Constitution*, 167-170.

³⁵ In the impeachment trial of President Johnson, this provision of the Constitution was referred to by Mr. Butler, one of the managers, in the following manner:—"I should hardly have dared, perhaps, to speak upon this question of constitutional law with any confidence, except so far as to bring to the mind of the Senate that the President has no right to call upon his Cabinet save through the constitutional method, were I not borne out in it by the opinion of Jefferson. Early in the government he took the same view that I have heretofore had the honor incidentally of stating to the Senate. There seems to be good reason for it, because the heads of departments were in the first place never expected to be a cabinet: there were but three of them. There has been a gradual growing up of this practice. The Constitution wisely, for good purposes, required that when the President wanted the advice of any one of his principal officers he should ask that advice in writing, and it should be given in writing, so that it should remain for all time exactly what the advice was which he received, and exactly the point made. And the reason of that was, there had been an attempt in the various trials of impeachment of members of cabinets to put in the fact of the order of the King to the cabinet, or the advice of various members of the cabinet to each other. That had been exploded in the Earl of Danby's case. That question used to arise under that state of facts before courts of impeachment, but our fathers evidently did not mean that it should arise here." Impeachment of President Johnson, vol. 1, 667.

It was also referred to in the same trial by Judge Curtis in these words:

"In respect to the practice of this government, and particularly

Nor is there anything in the Constitution, nor in the proceedings of the Constitutional Convention, nor in any act of Congress which states the process by which a cabinet officer is created. But from the administrations of Washington to the present it has been assumed that the heads of the departments became Cabinet officers by reason of their positions. A distinguished member of

the practice of Mr. Jefferson, in its relations to what preceded under other Presidents, I beg leave to refer to Mr. G. T. Curtis's History of the Constitution, vol 2, 409, note:

"Those who are not familiar with the precise structure of the American Government will probably be surprised to learn that what is in practice sometimes called the "Cabinet" has no constitutional existence as a directory body, or one that can decide anything. The theory of our government is that what belongs to the executive power is to be exercised by the uncontrolled will of the President. Acting upon the clause of the Constitution which empowers the President to call for the opinion in writing of the heads of departments, Washington, the first President, commenced the practice of taking their opinions in separate consultation; and he also, upon important occasions, assembled them for oral discussion in the form of a council. After having heard the reasons and opinions of each he decided the course to be pursued."

"And I may mention here in passing, that if Senators have the curiosity to look into the history of the period they will find that the latter course was pursued by General Washington, especially toward the close of his first and during his second administration, on very important occasions, one of the most prominent of which was the difficulty with the French minister, M. Genet, and the course that was pursued by the government growing out of these complications. The author proceeds:

"The second President, Mr. John Adams, followed substantially the same practice. The third President, Mr. Jefferson, adopted a somewhat different practice. When a question occurred of sufficient magnitude to require the opinions of all the heads of departments, he called them together, had the subject discussed, and a vote taken, in which he counted himself but as one. But he always seems to have considered that he had the power to decide against the opinion of his Cabinet. That he never or rarely exercised it was owing partly to the unanimity of sentiment that prevailed in his Cabinet, and to his desire to preserve that unanimity, and partly to his disinclination to the exercise of personal power. When there were differences of opinion he aimed to produce a unanimous result by discussion, and almost always succeeded. But he admits that this practice made the Executive in fact a directory."

"And then references are given to Mr. Jefferson's works in support of this statement. The author does not continue to speak of the subsequent practice of the government, as that no doubt was considered to be very familiar, his purpose being merely to point out

the United States Senate in the 60th Congress, said: "A man can be a cabinet officer without being the head of an executive department. There is no law which makes the Postmaster-General a member of the Cabinet. What made that officer a member of the Cabinet? It was a note of three lines from General Jackson to Mr. Barry, then Postmaster-General, requiring him, or inviting him, to attend the cabinet meeting the next day and thereafter. That made him a cabinet officer. The President can make every assistant attorney-general, every assistant postmaster-general, every assistant secretary of the treasury, every assistant secretary of the interior, or elsewhere, a cabinet officer if he chooses to call them into council. He can make anybody who is not a member of one of the other co-ordinate branches of the Government a cabinet officer. He is the President's counsellor, whom he chooses as he pleases."²⁸

This opinion would seem to carry the doctrine too far. If the President should invite some one, not officially connected with the Government, to attend the Cabinet meetings, and give him advice, would this make such person a Cabinet officer? It will hardly be contended it would.

As the matter is uniformly understood every head of a department is a Cabinet officer, not because the Constitution or the law says he shall be, but because that has

the origin of these two practices, the one being that the members of the Cabinet were called together and a consultation held, and then, as the result of that consultation, the President decided; the other practice being that a vote was taken in the Cabinet, the President himself ordinarily counting as one in that vote, but always understanding that he had the power, if he thought proper to exert it, to decide the question independently of the votes of the Cabinet. That, I understand, has continued to be the practice from Mr. Jefferson's time to the present day, and including all the Presidents who have intervened during that period." *Impeachment of President Johnson*, vol. 1, 669, 670.

²⁸ Cong. Record, Jan'y 13, 1909, 877, vol. 43, 60 Cong.

Professor Sumner says Jackson put the secretaries back more nearly to their place in which they belong by the original theory of the law. He made them executive clerks or staff officers. The fashion has grown up of calling the secretaries the President's "constitutional advisers." It is plain that they are not anything of the kind. He is not bound to consult them, and, if he does it does not detract from his responsibility. *Sumner's Life of Jackson*, 181.

been the unvarying custom from the beginning of the Government, so that it now has all the force of unwritten law.

The President does not officially require the opinion in writing of the heads of bureaus, or of any commissioner or auditor in the departments.⁸⁷

The President can not require the written opinion of the principal officer of one executive department as to matters in another department, and it is maintained by an eminent constitutional writer that there is "no *collegiate* existence of these officers recognized by the Constitution. The President may, if he chooses, consult them as a body, unless they themselves object. Should they object, he could not point to any specific clause in the Constitution which requires such an organization, or which authorizes him to require opinions in such a form. He might, of course, dismiss an officer who should refuse to take part in the collegiate deliberations."⁸⁸

⁸⁷ United States v. Germaine, 99 U. S., 508-511.

⁸⁸ Burgess Pol. Sci. and Const. Law, vol. 2, 263.

The following letter from President Madison to his Secretary of War, is expressive of Mr. Madison's views concerning the relations which should exist between the President and the heads of departments, shows the laxity which existed at that time in the relations between such officials, and also shows Mr. Madison's disposition to correct the same.

"For the Department of War,

"August 13, 1814.

"On viewing the course which the proceedings of the War Department have not unfrequently taken, I find that I owe it to my own responsibility, as well as to other considerations, to make some remarks on the relations in which the head of the department stands to the President, and to lay down some rules for conducting the business of the department which are dictated by the nature of those relations.

"In general, the Secretary of War, like the heads of the other departments, as well by express statute as by the structure of the Constitution, acts under the authority and subject to the decisions and instructions of the President, with the exception of cases where the law may vest special and independent powers in the head of the department.

"From the great number and variety of subjects, however, embraced by that department, and the subordinate and routine character of a great portion of them, it cannot be either necessary or convenient that proceedings relative to every subject should receive a previous and positive sanction to the Executive. In cases of that minor sort,

He (the President) shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

Among the enumerated powers of the President, as contained in the report of the Committee of Detail, was

it is requisite only that they be subsequently communicated, as far and as soon as a knowledge of them can be useful or satisfactory.

"In cases of a higher character and importance, involving necessarily, and in the public understanding, a just responsibility of the President, the acts of the department ought to be either prescribed by him or preceded by his sanction.

"It is not easy to define in theory the cases falling within these different classes, or, in practice to discriminate them with uniform exactness. But a substantial observance of the distinction is not difficult, and will be facilitated by the confidence between the Executive and the head of the department. The distinction has not been sufficiently kept in view.

"I need not repeat the notice heretofore taken of the measure consolidating certain regiments; a measure highly important under more than one aspect, and which was adopted and executed without the knowledge or sanction of the President; nor was it subsequently made known to him otherwise than through the publication of the act in the newspapers.

"The like may be said of certain rules and regulations, particularly a body of them for the hospital and medical departments, of which the law expressly required the approbation of the President, and which comprise a rule to be observed by the President himself in future appointments. The first knowledge of these latter regulations was derived from the newspapers.

"A very remarkable instance is a late general order prohibiting duels and challenges on pain of dismissal from the Army. However proper such an order may be in itself, it would never be supposed to have been issued without the deliberate sanction of the President; the more particularly, as it pledges an exercise of one of the most responsible of the Executive functions, that of summarily dismissing from military offices without the intervention of the military tribunal provided by law. This order was adopted and promulgated without the previous knowledge of the President, nor was it ever made known to him otherwise than by its promulgation.

"Instructions to military commanders relating to important plans and operations have been issued without any previous, or even any subsequent, communication thereof to the Executive; and letters expressly intended and proper for the knowledge and decision of the Executive have been received and acted on without being previously communicated, or the measure taken being made known to him.

"Other illustrations might be drawn from instances of other sorts leading to the result of these remarks. The above may suffice with the addition of one which with the circumstances attending it, will

this: "He shall have power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of an impeachment."³⁹ While this report was being considered by the Convention the expression, "except in cases of impeachment," was inserted after the word "pardons" without objection or debate, and the term "but his pardon shall not be pleadable in bar of an

be explained by a reference to the letter of resignation from General Harrison; to the letter of the President to the Secretary of War of May 24; to the issuing of the commission of major general to General Jackson, and the letter of the Secretary of War accompanying it.

"The following course will be observed in future:

"To be previously communicated to the President:

"1. Orders from the Department of War establishing general or permanent regulations.

"2. Orders for courts of enquiry or courts-martial on general officers or designating the numbers or members of the courts.

"3. Commissions or notifications of appointment to officers, other than regular promotions in uncontested cases.

"4. Dismissions of officers from the service.

"5. Consolidations of corps or parts of corps, and translations of field officers, from one regiment to another.

"6. Acceptances and refusals of resignations from officers above the rank of captains.

"7. Requisitions and receptions of militia into the service and pay of the United States.

"8. Instructions relating to treaties with Indians.

"9. Instructions to officers commanding military districts, or corps or stations, relative to military movements or operations.

"10. Changes in the boundaries of military districts or the establishment of separate commands therein; or the transfer of general officers from one district or command to another district or command.

"In the absence of the President from the seat of government previous communications to him may be waived in urgent cases, but to be subsequently made without delay. All letters giving military intelligence, or containing other matters intended or proper for the knowledge of the President, will of course be immediately communicated to him.

"These rules may omit cases falling within, and embrace cases not entirely within, the reason of them. Experience therefore may improve the rules. In the meantime they will give a more suitable order and course to the business of the department; will conduce a more certain harmony and co-operation in the proceedings of the several departments; and will furnish the proper opportunities for the advantage of cabinet consultations on cases of a nature to render them expedient.

"J. Madison."—Writings of Madison, vol. 3, 417-419.

³⁹ Journal, 457.

impeachment" was omitted.⁴⁰ When the provision went to the Committee on Style it was adopted in its present form.⁴¹ Conferring the power to pardon upon the President finds ample precedent in the history of England, where it has long been a prerogative of the Crown. It is an unlimited power and beyond the reach of Congress to control.

Mr. Justice Miller said of this provision, "In the absence of any more particular definition of it than is found in this short sentence of the Constitution, so far as it has become the subject of public discussion or of judicial decision reliance has been had mainly upon the nature and character of the power, as exercised by the Crown of Great Britain."⁴² Under this provision the power of the President to grant a pardon applies to every offence committed against the Government, including treason, except where an officer has been adjudged guilty on impeachment. As a general rule, a pardon restores the offender to the rights of citizenship, which would include the right to hold office and occupy a position of trust or profit under the Government, but it was the evident purpose of the framers of the Constitution that the judgment of the Senate in cases of impeachment should not be revoked, even by the Chief Executive, but should endure undisturbed through life.

There are two limitations to the President's power of pardon; First, he can pardon only for offences against the United States; second, he cannot pardon an impeached person. With these exceptions his power to pardon is unlimited.

A reprieve is a suspension of the execution of a sentence for a limited time. It is said to be a withdrawal or withholding of a punishment for a time after conviction and sentence, being in the nature of a stay of execution.⁴³

"A pardon is an act of grace by which an offender is released from the consequences of his offense. It

⁴⁰ Journal, 612.

⁴¹ Journal, 709.

⁴² Miller on Constitution, 165.

⁴³ Bouvier's Dictionary.

releases the offender and restores to him all civil rights. . . . But it does not make amends for the past. It affords no relief for what has been suffered by his imprisonment, forced labor or otherwise; nor does it give compensation for what has been done or suffered, nor impose upon the government any obligation to give it."⁴⁴

But it includes the power to grant relief from fines, penalties and forfeitures which follow from the commission of the offence.⁴⁵

An act of Congress allowed those persons whose property had been taken as captured and abandoned and sold, and the proceeds thereof turned into the treasury of the government, to claim the money and recover it by proceedings in the Court of Claims, on proof that claimants had been loyal citizens during the Civil War. The Supreme Court had decided that a pardon made proof of loyalty unnecessary. To offset the effect of this decision Congress passed an act that proof of loyalty was necessary to recovery, "notwithstanding any executive proclamation, pardon, amnesty or other act of condonation or oblivion."

But the Supreme Court held this act unconstitutional,⁴⁶ Justices Miller and Bradley dissenting. In the opinion, Chase, C. J., said, "The legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority and directs the court to be instrumental to that end."⁴⁷

The power of pardon, exercised at any time, either before legal proceedings are taken, or during their pendency, or after conviction and judgment, is not subject to legislative trial. Congress can neither limit the effect of a pardon nor its exercise in classes of offenders. The benign

⁴⁴ *Knote v. United States*, 95 U. S., 149-153.

⁴⁵ *United States v. Osborn*, 91 U. S., 474.

⁴⁶ *United States v. Klein*, 13 Wallace, 148.

⁴⁷ *Miller on the Constitution*, 166.

prerogative of mercy reposed in the President cannot be fettered by any legislative restrictions. It has been held, "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence."⁴⁸

Deady, D. J., in commenting on this language,⁴⁹ said: "This is probably as strong and unqualified a statement of the law, scope and efficacy of a pardon as can be found in the books. And yet I do not suppose the opinion is to be understood as going to the length of holding that while the party is to be deemed innocent of the crime by reason of the pardon from and after the taking effect thereof, that it is also to be deemed that he never did commit a crime or was convicted of it. The effect of the pardon is prospective and not retrospective. It removes the guilt and restores the party to a state of innocence. But it does not change the past and cannot annihilate the established fact that he was guilty of the offence."

A pardon and amnesty made by a public proclamation of the President has the force of public law, of which all courts and officers must take notice, whether especially called to their attention or not.⁵⁰

A case involving the extent of the pardoning power arose under an act of Congress of June 30, 1864, which gave a portion of the penalty to informers. Judgment was rendered against the defendant. But before the judgment or any part thereof was paid, the President issued to the defendant a full and unconditional pardon of the judgment and penalties. It was claimed that the pardon could not include that portion of the judgment to which the informer was entitled by the terms of the statute, but it was held by McDonald, D. J., that it did.⁵¹

A pardon may be granted on such conditions as the

⁴⁸ *Ex parte Garland*, 4 Wallace, 380.

⁴⁹ *In re Spencer*, 5 Sawyer, 199.

⁵⁰ *Jenkins v. Callard*, 145 U. S., 561.

⁵¹ *United States v. Thomasson*, 4 Bissell, 336.

President may choose to impose,⁵² and may be granted as well before trial as after conviction.⁵³ But the conditions to be valid must be reasonable. If a condition should be included in a pardon to the effect that the one who is pardoned should never tell the truth, or that he should commit a crime, or that he should not thereafter eat or sleep, the pardon would be of no validity.⁵⁴ A statute which authorizes other officers than the President to remit penalties and forfeitures does not conflict with the power of the President to pardon.⁵⁵ A pardon may be revoked any time before delivery,⁵⁶ and when obtained through fraud is void.⁵⁷ The President alone can pardon a violation of an act of Congress in a territory.⁵⁸

In an opinion by Attorney-General Crittenden it is said, "To understand the meaning of a pardon and the extent to which the power to pardon may be rightfully exercised by the President of the United States, we must look to the books of authority respecting the prerogative power of pardoning rightfully belonging to the King of Great Britain, by the common law of the people of England; whose principles of jurisprudence the people of the United States brought with them as colonists and established here, in so far as they were of a general nature, not local to that kingdom and not repugnant to the American institutions." The opinion reviewed many cases and the conclusion reached was, "that the President cannot, in the exercise of his pardoning power, remit pecuniary penalties attached to an offence, unless those penalties accrue to the United States."⁵⁹

"A pardon by the President of the United States, after condemnation involving all the interests of the United States in the penalty incurred by violating the embargo laws, and which discontinued all further proceedings on the part of the United States, did not, it was held,

⁵² *United States v. Klein*, 13 Wallace, 147; 11 Op. A. G. 229.

⁵³ *Miller on Constitution*, 165.

⁵⁴ 11 Op. A. G., 229.

⁵⁵ *The Laura*, 114 U. S., 414.

⁵⁶ *In re De Puy*, 7 Fed. Cases, 506.

⁵⁷ 11 Op. A. G., 229.

⁵⁸ 7 Op. A. G., 561.

⁵⁹ 5 Op. A. G., 532-536.

remit the interests of the custom house officers in a moiety."⁶⁰ But the Supreme Court held,⁶¹ that it was conceded that "excepting in cases of impeachment and where fines are imposed by a co-ordinate department of the Government for contempt of its authority, the President had the power to remit fines, penalties, etc., of every description arising under the laws of Congress."

The effect of an unconditional pardon of a person convicted of a felony is a complete restoration of his competency as a witness, notwithstanding the pardon contained the provision that it was given for such a purpose.⁶²

The President may mitigate the punishment of death, by substituting a milder punishment,⁶³ but he cannot direct that a federal prisoner be admitted to bail, as that is a judicial question.⁶⁴

There is some conflict of opinion whether the President has power to pardon for contempt of court. The question has been submitted from time to time to the Attorney-General of the United States and that official has declared the President has such power. A contempt of court having been committed in the presence of the judge of a United States circuit court, the offender was fined in the sum of \$400.00. Afterwards a pardon was applied for from the President as a relief against the fine and the question was submitted to the Attorney-General, "whether the executive authority to pardon extended to such cases." That official gave it as his opinion that "there is nothing in the character of this offense which withdraws it from the general 'authority' of the President to grant reprieves and pardons."⁶⁵ In another case two defaulting jurors were fined and subsequently they applied to the President for a pardon relieving them from such fine, and the Attorney General held that the President had power to grant it.⁶⁶

It was later held by that official, that the President could remit fines assessed against those who had been

⁶⁰ United States v. Lancaster, 4 Wash. C. C., 64.

⁶¹ The Laura, 114 U. S., 413.

⁶² Boyd v. United States, 142 U. S., 450.

⁶³ 1 Op. A. G., 213.

⁶⁴ 1 Op. A. G., 213.

⁶⁵ 3 Op. A. G., 622.

⁶⁶ 4 Op. A. G., 458.

convicted of aiding in the escape of slaves from their masters, and the President could also discharge the offenders from imprisonment.⁶⁷

All these opinions were approved by Judge Blatchford, afterward a justice of the Supreme Court of the United States. While on the district bench he held that contempt of court is an offense against the United States, and that where a fine is imposed as a punishment for contempt of court, the case comes within the power of the President to pardon.⁶⁸

These opinions came under review by the circuit court, which held that they were neither "controlling nor persuasive, because they contain no discussions and give no consideration to the controlling fact, which must in the end condition and determine the decision and questions" (p. 457). It was also held that Judge Blatchford had abandoned his decision.

The court said, "Can it be that there is any appeal from the decision of a federal court in a civil action upon the rights of the parties to it, or from the lawful orders it makes to secure those rights to the executive department of the national government? May the President review and reverse or modify the decisions or orders of a court of competent jurisdiction, made in a civil action, to secure or enforce the rights or the legal remedies of the private parties to the suits before it? If, in an action for specific performance, a court orders a defendant to surrender title deeds in his possession, and commits him until he does so, may the Executive review the case, relieve the defendant from imprisonment and thus reverse the effect of the decision of the court, and practically hold that the plaintiff is entitled to no relief? If a defendant in equity or a bankrupt is found to have trust funds in his possession, and is ordered by a court of competent jurisdiction to pay them over to the

⁶⁷ 5 Op. A. G., 579.

⁶⁸ *In re Nulle*, 7 Blatchford, 23.

In *State ex rel. v. Sauvinet*, 24 La. Ann., 119, these opinions and the decision of Judge Blatchford were followed. In *ex parte Hickey*, it was held: "The governor of a State has power . . . to pardon a contempt committed against a circuit court, and to release and remit the sentence of fine and imprisonment, inflicted upon the offender." 4 Smedes & Marshall, 751.

cestui que trust, and be committed until he does so, may the executive department relieve from this commitment, and thus make the order and decree of the court as 'idle as a painted ship upon a painted ocean?' If a defendant in a suit of equity is fined for the benefit of the plaintiff, or is imprisoned to coerce him to obey an injunction, may the President relieve from the fine or imprisonment, and thus render the decision and order of the court nugatory, and the complainant remediless? . . . (p. 454.)

"If the President has the power to pardon those who are committed for criminal contempts of the authority of the courts, and thus to relieve them from fines or imprisonments inflicted to punish them for their disobedience, this immemorial attribute of judicial power is thus practically withdrawn from the courts and transferred to the executive; for he may pardon whom he will, and he would have the power so to exercise this authority as to deprive the courts of all means to punish for disobedience of their orders. Is there any provision of the Constitution of the United States which grants this inherent and essential attribute of judicial power, or the authority to control its exercise, to the executive? Congress has undoubted authority to punish recalcitrant witnesses for contempt of its authority. The offenses of such witnesses are as much offenses against the United States as the offenses of witnesses, juror, or parties who disobey the orders, writs, or processes of the courts. May the President pardon such witnesses who are committed for the purpose of punishing them for the disobedience of such orders and processes, and thus deprive Congress and the courts of the ability to punish for disobedience of their lawful orders and processes? If a court fines or imprisons a juror because he refuses to obey its mandate when summoned, or because he refuses to act when he appears, may the President immediately pardon him, and thus relieve him from all punishment for disobedience of the order of the court? May he pardon all jurors for all disobedience of the mandates of the courts, and thus practically deprive the courts of the power to summon jurors? If riotous persons are fined or imprisoned for disturbing, defying,

and preventing the proceedings of a court, may the President pardon them, and thus deprive the court of the power to continue its sessions, and to discharge its functions? In other words, has the executive the power, if he chooses to exercise it, of drawing to himself all the real judicial power of the nation which the Constitution vested in express terms in the courts, by means of his supreme control of the inherent and essential attribute of that power,—the authority to punish for disobedience of the orders of the courts? These questions seem to suggest their answers (pp. 456, 457).

“Proceedings for contempt are of two classes—those prosecuted to preserve the power and vindicate the dignity of the courts, and to punish for disobedience of their orders, and those instituted to preserve and enforce the rights of private parties to suits, and to compel obedience to orders and decrees made to enforce the rights and administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial, and coercive in their nature, and the parties chiefly in interest in their conduct and prosecution are the individuals whose private rights and remedies they were instituted to protect or enforce. . . . (p. 458.)

“An order committing a defendant for contempt in refusing to pay a fine or to obey an order made in a civil suit for the purpose of enforcing the rights and administering the remedies of a party to the action is civil and remedial, and not criminal, in its nature; that it does not fall within the pardoning power of the President because it is not an execution of the criminal laws of the land; and that it is always within the power and subject to the modification, suspension, or discharge of the court which has made it, and of that court alone, either in the original case or in an appropriate auxiliary proceeding” (p. 453).⁶⁰

This decision proceeds upon the theory that a fine or a sentence of imprisonment imposed in a civil action as a punishment for violating an order or judgment of a

⁶⁰ In re Nevill, 117 Fed. Rep., 448.

court is a civil proceeding and consequently not within the pardoning power of the President.

The President can pardon only for *offences committed against the United States*. How can a judgment of a court in a civil action against one who has violated the order of the court be held to be such an offense? There is a wide difference between such a proceeding and that, for example, where a person has been convicted of violating the criminal statutes of the country. To rob the mail, or burglarize a post office, or violate the national banking laws is a criminal offense against the United States, and in all such cases the power of the President to pardon the offender is unquestioned, but the power cannot be extended to include one who has been sentenced to pay a fine or be imprisoned as a punishment for violating the order of a court in a civil proceeding. The offense in such a case is not an offense against the United States and consequently the President has no authority over it.

In *In re Debs*, Mr. Justice Brewer said, "A court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only securing to suitors the rights which it has adjudged them entitled to."^{69a} This was the ancient doctrine and it has not been changed by any modern decision.

It is not within the President's power to remit a judgment obtained against a surety on a bond rendered in a criminal case in the courts of the United States.⁷⁰

Except in cases of Impeachment.—The President in cases of impeachment cannot pardon. The judgment in impeachment is removal from office and disqualification to hold and enjoy any office of honor, trust, or profit, under the United States.⁷¹ It might happen that some officer would be impeached and judgment rendered against him, whom the President did not wish to see punished, and if he had the power of pardon in such cases he could pardon him and then reappoint him to his position and defeat the action of Congress.

Mr. Tucker, in commenting on this clause, said: "The

^{69a} 158 U. S., 564, 596.

⁷⁰ 11 Op. A. G., 125.

⁷¹ Art. 1, sec. 3, clause 7.

cause of this exception will be readily perceived by recurring to the abuse of the pardon power in England, where the Crown was disposed to screen a wicked favorite from the punishment resulting from a conviction of impeachment. If the officers of the Crown were made responsible to the people through the impeaching power of the House of Commons, that responsibility would be of no avail if the Crown could shield its favorite from his well-merited punishment. Accordingly in the act of settlement, twelfth and thirteenth of William III, it was expressly provided, 'that no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.'

"The framers of the Constitution of the United States no doubt took this provision of our Constitution from this clause in the act of settlement, which was the result in England of a long struggle between the Crown and the Commons. So that the pardon of the President, while it may avail the guilty party when convicted in an ordinary court of criminal jurisdiction, will not avail to shield the criminal from the judgment of amotion from office and of disqualification to hold office thereafter, which the judgment in impeachment may inflict upon it.'"⁷²

Akin to his power to reprieve and pardon the President can also issue proclamations of amnesty, although that term does not appear in the Constitution.⁷³

Amnesty is an act of sovereign power granting oblivion, or a general pardon for a past offense. It is rarely, if ever, exercised in favor of single individuals, but is usually executed in behalf of certain classes of persons who are subject to trial, but who have not been convicted.⁷⁴ This power was exercised by Presidents Washington, John Adams, Madison, Lincoln, Johnson and Grant.

On the 25th of December, 1868, President Johnson issued a general proclamation of amnesty by which he granted "unconditionally and without reservation, to all and to

⁷² 1 Tucker on the Constitution, 422, 423.

⁷³ Jenkins v. Collard, 145 U. S., 546, 560. Armstrong v. United States, 13 Wallace, 154. Carlisle v. U. S., 16 Wallace, 148.

⁷⁴ Brown v. Walker, 161 U. S., 601, 602.

every person, who directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the Constitution, and the laws which have been made in pursuance thereof."

The power of the President to issue this proclamation was made the subject of investigation by the judiciary committee of the Senate which on the 17th day of February, 1869, through Senator Edmunds reported the following resolution: "That, in the opinion of the Senate, the proclamation of the President of the United States, of the 25th of December, 1868, purporting to grant general pardon and amnesty to all persons guilty of treason and acts of hostility to the United States during the late rebellion, with restoration of rights, etc., was not authorized by the Constitution or laws."⁷⁵

This report is the only authority which challenges the power of the President to issue such a proclamation. As it was not approved by the Senate and especially in view of the fact that the power to issue such proclamations has been so frequently sustained by the Supreme Court, the resolution cannot be regarded as authority against the exercise of such power by the President.⁷⁶

⁷⁵ 40 Congress, 3 Sess., Senate Rep. No. 239.

⁷⁶ In 20th Opinions of Attorneys General, 330, 339, there is a very full and learned discussion of the general power of the President to issue proclamations of amnesty by Hon. William H. Taft, then Solicitor General, now President of the United States, in which the question is discussed from a historical and legal standpoint, with great ability and force. The conclusion arrived at, is that the President has the power under the Constitution without Congressional authority, to issue a general pardon of amnesty.

CHAPTER XXXVII.

THE EXECUTIVE, CONTINUED.

He shall have power, by and with the advice and consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

This section is the source of the President's greatest power as a civil officer.

Definitions.—A *treaty* has been defined to be a contract entered into between independent nations with a view to their public welfare. It is generally made to continue for a long period of time.

Conventions are agreements between nations, but generally relate to matters of minor importance and of shorter duration than treaties.

History of Treaties in the United States.—Historically speaking there are three periods in the legislative life of the United States.

The first period began with the first Colonial Congress and ended with the adoption of the Articles of Confederation. The time covered by this period was from September 5, 1774, to March, 1781, when the country had no written Constitution nor form of government. Congress was the only instrumentality by which the country was governed, and that was held together only by the absolute and imperative necessity of the States being united to act in common unison. In this period, to wit, on the 29th of November, 1775, a committee of secret cor-

respondence was appointed by Congress to correspond with foreign nations friendly to America.¹ After Congress determined that the colonies should strive for independence, it appointed on the 11th of June, 1775, a committee to negotiate treaties with foreign nations. This committee was composed of Benjamin Franklin, Mr. Deane and Thomas Jefferson. Mr. Jefferson being unable to serve, Arthur Lee was appointed in his place.

Prior to the adoption of the Articles of Confederation, this committee, or the commissioners, as they were called, executed three treaties in the name of the thirteen united colonies of America, all with France and signed them in their individual names. The first treaty which the commissioners made is known as the Treaty of Amity and Commerce, and was made on the 6th of February, 1778; it is so remarkable in its construction, so admirable and accurate in its expression, that to this day it is considered a precedent in form and style.

The second period embraces the time from the ratification of the Articles of Confederation in 1781 to the adoption of the Constitution in 1789, a period of eight years. During this time thirteen treaties were made by the United States through commissioners duly appointed for that purpose. In the treaty between the United States and Great Britain, signed in Paris on November 30, 1782, and afterwards known as the Definitive Treaty of Peace, the name of the United States was first used as a party to a treaty.

Sixteen treaties were made by the representatives of the United States before the adoption of the Federal Constitution. Under the Articles of Confederation, the power to make a treaty, conference, alliance or agreement was forbidden to a State, unless the consent of "the United States in Congress Assembled" was obtained. And no two or more States were permitted to make any treaty, confederation or alliance with each other without the consent of "the United States in Congress Assembled" was first obtained and unless the purposes for which the same were made and the terms of their contin-

¹ The members of the committee were Mr. Harrison, Benjamin Franklin, Mr. Johnson, Mr. Dickinson and Mr. Jay. 1 Pitkin's History, 384.

uance were accurately specified. Congress could make no treaty or alliance unless nine States—being two-thirds of all the States—assented. The sole and exclusive right and power to enter into treaties and alliances were vested in “the United States in Congress Assembled,” but no treaty of commerce could be made by which the legislative power of the respective States could be restricted from imposing such imposts and duties upon foreigners as their own people were subjected to.

The third period began with the establishment of the Government under the Federal Constitution. Having seen that the Colonial Congress exercised the power to make treaties, and continued to do so under the Articles of Confederation, we will trace the subject through the debates in the Constitutional Convention in order that we may see why the framers of the Constitution placed this great and important power where it is found.

The treaty power in the Convention.—Mr. Pinckney wished the Senate to have the sole and exclusive power to make treaties.² Mr. Hamilton wished the Executive, with the advice and approbation of the Senate, to have the power.³

The Committee of Detail reported, “The Senate of the United States shall have power to make treaties.”⁴

As part of the unfinished business, the subject was then referred to the Committee of Eleven, which reported, “The President by and with the advice and consent of the Senate, shall have power to make treaties. But no treaty shall be made without the consent of two-thirds of the members present.”⁵

When this was up in the Convention, Mr. Wilson moved to amend by inserting after the word “Senate,” the words “and the House of Representatives,” so that both bodies would be required to pass a treaty. The amendment was lost, Pennsylvania being the only State voting for it.⁶ Mr. Wilson and Mr. King objected to requiring two-thirds of the members present to concur in treaties, saying that they put it into the power of a minority to control the will

² Journal, 69.

³ Journal, 185.

⁴ Journal, 455.

⁵ Journal, 655, 656.

⁶ Journal, 680.

of the majority. Mr. Madison moved to insert the word "treaty," after the words "except treaties of peace," allowing such treaties to be made with less difficulty than others, and this was agreed to, but the next day it was defeated.

Mr. Dayton and Mr. Wilson moved to strike out the clause requiring two-thirds of the Senate for making treaties, but only Delaware voted in favor of the motion. Mr. Rutledge and Mr. Gerry moved "that no treaty shall be made without the consent of two-thirds of all the members of the Senate, according to the example of the present Congress," but this was defeated by a vote of eight to three.

Mr. Sherman then moved "that no treaty shall be made without a majority of the whole number of the Senate." This motion was also defeated by a vote of five to six.

Mr. Madison moved, "that a quorum of the Senate consist of two-thirds of all the members." This was defeated by the same vote. Mr. Williamson and Mr. Gerry then moved, "that no treaty should be made without previous notice to the members and a reasonable time for their attending," but only three States voted for it.

The clause in the report of the Committee of Eleven, "that no treaty should be made without the consent of two-thirds of the members present," was then passed, only the States of Pennsylvania, New Jersey and Georgia voting against it.⁸

It would seem that so important a subject ought to have occupied more of the attention and time of the Convention. What was finally agreed upon, viz., conferring the right to make treaties upon the President and Senate, was doubtless a compromise between the element in the Convention which wished to give the power to the President and that which wished to give it to the Senate. The extent of the right to make treaties was not considered by the Convention. It seemed satisfied with lodging the power with the President and Senate.

To have conferred the power on a larger number, such as a majority of the whole Congress, would have seriously crippled the utility of the power. It would have lessened

⁷ Journal, 682, 686.

⁸ Journal, 687.

the element of secrecy so necessary in the formative period of a treaty. On the other hand, requiring a large number of Senators to concur in a treaty secures it from hasty or inconsiderate action before its completion. The language of the Constitution, "by and with the advice and consent of the Senate," has become practically only a consent or concurrence. That body seldom advises the President about the treaty. The great power in the formation of a treaty is the President. It is his will which is put into it.

When the treaty is agreed upon by the President and the foreign power with which it is to be made, it is submitted to the Senate. It is then too late for advice, but consent may be given or withheld as the Senate determines. The Senate is not bound—is under no constitutional or other obligation to concur in a treaty in the form and manner in which it is presented to it. On receiving it, the Senate may do one of three things—concur in it, amend it, defeat it. The Senate is part of the treaty-making power and cannot be compelled to approve a treaty because it is acceptable to the President. Without the concurrence of the Senate, the treaty fails. This makes the Senate as powerful in the final passage of the treaty as the President is in the beginning. The Senate gets the treaty from the President in the first instance. The President gets it from the Senate in the second instance. Frequently it is a different instrument when it returns to him from what it was when he sent it to the Senate. The Senate may add to the treaty, or take from it, or change its meaning.⁹ An instrument purporting to be a treaty which has not been ratified by the Senate is of no binding force. To be effective and operate as a treaty it must have been made with the "advice and consent of the Senate," otherwise it is a nullity.¹⁰

Mr. Hamilton has considered and answered the objections against conferring the power of making treaties on the President alone. "An hereditary monarch, though often the oppressor of his people, has personally too much at stake in the government to be in any material

⁹ *Haver v. Yaker*, 9 Wallace, 35.

¹⁰ *In re Sutherland*, 53 Fed. Rep., 551.

danger of being corrupted by foreign Powers; but a man raised from the station of a private citizen to the rank of chief magistrate, possessed of but a moderate or slender fortune, and looking forward to a period not very remote when he may be obliged to return to the station from which he was taken, might sometimes be under temptations to sacrifice duty to interest, which it would require superlative virtue to withstand. An avaricious man might be tempted to betray the interests of the State for the acquisition of wealth. An ambitious man might make his own aggrandizement, by the aid of a foreign Power, the price of his treachery to his constituents. The history of human conduct does not warrant that exalted opinion of human virtue which would make it wise in a nation to commit interests of so delicate and momentous a kind, as those which concern its intercourse with the rest of the world, to the sole disposal of a magistrate created and circumstanced as would be a President of the United States."

Answering the argument of those who desired to confer the power of making treaties upon the Senate alone, Mr. Hamilton said:

"This would have been to relinquish the benefits of the constitutional agency of the President in the conduct of foreign negotiations. It is true that the Senate would, in that case, have the option of employing him in this capacity; but they would also have the option of letting it alone; and pique or cabal might induce the latter rather than the former. Besides this, the ministerial servant of the Senate could not be expected to enjoy the confidence and respect of foreign Powers in the same extent with the constitutional representative of the nation; and, of course, would not be able to act with an equal degree of weight or efficacy. While the Union would, from this cause, lose a considerable advantage in the management of its external concerns, the people would lose the additional security which would result from the co-operation of the Executive. Though it would be imprudent to confide in him solely so important a trust, yet it can not be doubted that his participation would materially add to the safety of the society. It must indeed be clear, to a demonstration, that the joint

possession of the power in question by the President and Senate would afford a greater respect of security than the separate possession of it by either of them. And whoever has maturely weighed the circumstances which must concur in the appointment of a President, will be satisfied that the office will always bid fair to be filled by men of such characters, as to render their concurrence in the formation of treaties peculiarly desirable, as well on the score of wisdom as on that of integrity.

"The remarks made in a former number will apply with conclusive force against the admission of the House of Representatives to a share in the formation of treaties. The fluctuating and, taking its future increase into the account, the multitudinous composition of that body forbid us to expect in it those qualities which are essential to the proper execution of such a trust. Accurate and comprehensive knowledge of foreign politics; a steady and systematic adherence to the same views; a nice and uniform sensibility to national character; decision, *secrecy* and despatch—are incompatible with the genius of a body so variable and so numerous. The very complication of the business, by introducing a necessity of the concurrence of so many different bodies, would of itself afford a solid objection. The greater frequency of the calls upon the House of Representatives, and the greater length of time which it would often be necessary to keep them together when convened, to obtain their sanction in the progressive stages of a treaty, would be a source of so great inconvenience and expense, as alone ought to condemn the project."

The suggestion that two-thirds of all the members of the Senate, in place of two-thirds of the members present, should concur in a treaty, Mr. Hamilton answered in the following way:

"It has been shown, under the second head of our inquiries, that all provisions which require more than the majority of any body to its resolutions, have a direct tendency to embarrass the operations of the government, and an indirect one to subject the sense of the majority to that of the minority. This consideration seems sufficient to determine our opinion, that the Con-

vention have gone as far in the endeavor to secure the advantage of numbers in the formation of treaties as could have been reconciled either with the activity of the public councils, or with a reasonable regard to the major sense of the community. If two-thirds of the whole number of members had been required, it would in many cases, from the non-attendance of a part, amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed is a history of impotence, perplexity, and disorder. Proofs of this position might be adduced from the examples of the Roman tribuneship, the Polish Diet and the States-General of the Netherlands; did not an example at home render foreign precedents unnecessary."¹¹

The power being expressly conferred by the Constitution on the President and Senate to make treaties and there being no bounds set to their power, they are without limitation, except they can not violate other provisions of the Constitution, or invade the other departments of the government.¹²

The right to make a treaty is one of the inherent prerogatives of sovereignty. When a new government is established it acquires certain inherent rights which are recognized by the law of nations. Among these would be the right to raise an army or navy; the right to levy taxes for its support; the right to build forts and arsenals; the right to make laws for its people, and the right to make a treaty with other powers. Foreign territory may be acquired by treaty and the power to acquire territory in that way carries with it the power to govern such territory after it is acquired, and to prescribe the terms upon which the acquiring country will receive its inhabitants and to determine what their status shall be.¹³

"Under the power given to the President and Senate to make treaties it must be assumed," said Mr. Justice Clifford, "that the framers of the Constitution intended that the power should extend to all those objects which, in the intercourse of nations, had usually been regarded

¹¹ The Federalist No. 75.

¹² Case of *Ferreioa dos Santos*, 2nd Brock, 493.

¹³ *Downes v. Bidwell*, 182 U. S., 279.

as the proper subjects of negotiation and treaty, if not inconsistent with the nature of our government and the relations between the States and the United States. This power would authorize the United States in making treaties with the Indian tribes."¹⁴

While the President and Senate can make a treaty they can not abrogate or repeal it. To do this requires both branches of Congress.¹⁵ But while Congress can abrogate a treaty, it is bound to regard public treaties while they are in force.¹⁶

The Constitution does not descend to details on the subject of treaties. It confers the power upon the President and Senate to make treaties and this power is conferred in general, and not specific terms. The power, therefore, includes all those matters which were the subjects of treaty at the time the Constitution was formed, providing they are consistent with the nature and provisions of the Constitution. The recognition and enforcement of the principles of public law being among the ordinary subjects of treaties, were of necessity included in the power conferred on the President and Senate to make treaties.¹⁷

Mr. Jefferson said: "To what subjects the treaty power extends has not been defined in detail by the Constitution; nor are we entirely agreed among ourselves. 1. It is admitted that it must concern the foreign nation party to the contract, or it would be a mere nullity, *res inter alias acta*. 2. By the general power to make treaties, the Constitution must have intended to comprehend only those subjects which are usually regulated by treaty, and can not be otherwise regulated. 3. It must have meant to except out of these the rights reserved to the States, for surely the President and Senate can not do by treaty what the whole Government is interdicted from doing in any way. 4. And also to except those subjects of legislation in which it gave a participation to the House of Representatives." Jefferson's Constitutional Manual, 186, Crutchfield's ed.

¹⁴ Holden v. Joy, 17 Wallace, 243.

¹⁵ Fong Yue Ting v. United States, 149 U. S., 721; La Abra Silver Mining Co. v. United States, 175 U. S., 460.

¹⁶ Reichart v. Felps, 6 Wallace, 165.

¹⁷ Holmes v. Jennison, 14 Peters, 569.

The treaty power of the United States extends to all proper subjects of negotiation between this government and those of other nations, and to protecting the ownership, transfer and inheritance of property which citizens of one country may have in another. It is unlimited under the Constitution, except as to restraints found in that instrument, and except those which arise from the nature of the government itself and as to those of the States.¹⁸

Under the treaty power, territory may be acquired and provisions made for its government and the terms fixed upon which the inhabitants of such territory will be received into the United States.¹⁹ The federal government may also provide under the treaty power for the establishment of judicial tribunals in foreign countries for the benefit of its own citizens.²⁰

A treaty made with a sovereign inures to his successors.²¹ War may suspend the operations of a treaty.²² The establishment of boundaries between States may be accomplished by a treaty.²⁴ But the terms of a treaty can not transcend the Constitution. A treaty may be repealed by a statute and so may a statute be repealed by a treaty.²⁵ A treaty takes effect from the date on which it is signed.²⁶

Under the provisions of the Constitution the House of Representatives has nothing to do with treaties, as that instrument imposes no responsibility upon that body and requires no duty of it in connection with that subject. But a treaty often requires an appropriation, and then it comes before the House of Representatives like other legislation and the House at such times considers it one of its prerogatives to inquire into the provisions, terms and general scope of the treaty, and though it can not claim any right to be consulted in the formation of a

¹⁸ *Geofroy v. Riggs*, 133 U. S., 267.

¹⁹ *Downes v. Bidwell*, 182 U. S., 279; *Dow v. United States*, 195 U. S., 140.

²⁰ *In re Ross*, 140 U. S., 463.

²¹ *The Sapphire*, 11 Wallace, 168.

²² *Society, etc., v. New Haven*, 8 Wheaton, 494.

²⁴ *United States v. Texas*, 162 U. S., 1-38.

²⁵ *The Cherokee Tobacco*, 11 Wallace, 616, 621.

²⁶ *Haver v. Yaker*, 9 Wallace, 34.

treaty it can prevent its execution by declining to vote for an appropriation in aid of its consummation. Just what conditions would justify such conduct on the part of the House would be difficult to determine and perhaps no general rule could be adopted on the subject, but an eminent constitutional writer suggests that the House could decline to assist in passing an appropriation for a treaty which was unconstitutional or manifestly unwise, though he admits this would be an extreme position for the House to take.²⁷

The House of Representatives first took the position in Washington's time that it was entitled to have the papers relating to a treaty. What was commonly called "Jay's Treaty" was ratified in London in 1795, and a copy of it transmitted to Congress by the President in March, 1796. A large number of the members of the House of Representatives being opposed to the treaty, a resolution was passed by that body, "That the President of the United States be requested to lay before this House a copy of the instructions given to the minister of the United States, who negotiated the treaty with Great Britain, communicated by this message of the 1st instant, together with the correspondence and documents relating to the said treaty, excepting such of said papers as any existing negotiations may render improper to be disclosed."²⁸

On this resolution, a long debate occurred which resulted in the resolution passing by a vote of 62 to 37. The President replied to the committee that he would "take the request of the House into consideration." The next day he addressed the following note to Mr. Pickering, his Secretary of State:

"Philadelphia, March 25, 1796.

"Sir: The resolution moved in the House of Representatives, for the papers relative to the negotiations of the treaty with Great Britain having passed in the affirmative, I request your opinion:

"1. Whether that branch of Congress has or has not a right, by the Constitution, to call for those papers?

²⁷ Cooley's Constitutional Law, 163.

²⁸ Sparks' Washington, vol. XI, 115, note.

"2. Whether, if it does not possess the right, it would be expedient under the circumstances of this particular case to furnish them?

"3. And, in either case, in what terms would it be most proper to comply with, or to refuse, the request of the House?

"These opinions in writing, and your attendance, will be expected at ten o'clock tomorrow."

He also sent a similar note to each member of the Cabinet.²⁹

The members of the Cabinet were unanimous in their opinion that the President should not comply with the resolution, each stating his individual reason in writing. As a result of this agreement between the President and his Cabinet a message was sent to the House in which the President said: "A just regard to the Constitution, and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request."³⁰

The President had especially requested Mr. Hamilton to prepare an opinion upon this subject, which resulted in Mr. Hamilton's writing a paper in which he advised the President not to comply with the demands of the House.

In reply to this paper the President sent the following letter:

"Philadelphia, 31 March, 1796.

"My dear Sir:—I do not know how to thank you sufficiently for the trouble you have taken to dilate on the request of the House of Representatives for the papers relative to the British treaty; nor how to apologize for the trouble, much greater than I had any idea of giving, which you have taken to show the impropriety of that request.

"I had from the first moment, and from the fullest conviction in my mind, resolved to *resist the principle*, which was evidently intended to be established by the call of the House of Representatives; and only deliberated on the manner, in which this could be done with the least bad consequences.

²⁹ Sparks' Washington, vol. XI, 114, 115.

³⁰ Sparks' Washington, vol. XI, 116, note.

“To effect this, three modes presented themselves to me: First, a denial of the papers *in toto*, assigning concise but cogent reasons for that denial; secondly, to grant them in whole; or, thirdly, in part; accompanied in both the last-mentioned cases with a pointed protest against the right of the House to control treaties, or to call for papers without specifying their object, and against the compliance being drawn into a precedent.

“I had as little hesitation in deciding that the first was the most tenable ground; but from the peculiar circumstances of this case it merited consideration, if the *principle* could be saved, whether facility in the provisions might not result from a compliance. An attentive examination of the subject and papers, however, soon convinced me that to furnish *all* the papers would be highly improper, and that a partial delivery of them would leave the door open for as much calumny as a refusal of them altogether,—perhaps more, as it might, and I have no doubt would be said, that all such as were essential to the purposes of the House were withheld.

“Under these impressions I proceeded with the heads of departments and the Attorney-General to collect materials and to prepare an answer, subject however to revision and change according to circumstances. This was ready on Monday, and proposed to be sent in on Tuesday; but it was delayed until I should hear from you, which happened on that day about noon. This induced a further postponement until yesterday, notwithstanding the apparent and anxious solicitude, which was visible in all quarters to learn the result of the application.

“Finding that the draft which I had prepared embraced most if not all the principles which were detailed in yours of yesterday, though not the reasonings; that it would take considerable time to copy yours, and above all having understood that, if the papers were refused, a fresh demand with strictures upon my conduct was to be expected, I sent in the answer which was ready, and have reserved yours as a copious resource in case the matter should go any further.

“I could not be satisfied without giving you this short explanation of the business, for the pains you have taken

to investigate this subject, and to assure you, over and over, of the warmth of my friendship."³¹

The debate which began in Congress at this time over the right of the House of Representatives to have the President transmit to Congress, or either branch of it, such public papers as might be called for has been renewed at different times in Congress to the present day.

In 1868 the treaty with Russia for the purchase of Alaska was pending in the House on the question whether that body should vote for the appropriation which the treaty called for. Mr. Banks, then chairman of the committee on appropriations and at one time Speaker of the House, said: "We do not deny, as was denied in the early history of this Government, the right of the House to information upon this subject, nor its right to consider a treaty in all its aspects and relations, or to determine its action upon its own discretion and judgment. For myself, I hold the authority to make a treaty conferred by the Constitution upon the President and the Senate of the United States to be a limited power; that the House of Representatives, as a co-ordinate branch of the Government, has a clear and unquestionable constitutional right to consider the subject of a treaty both before and after it is concluded, or at any time when it shall be the interest of the country so to do, to ascertain for itself whether it be in contravention of the established policy and interests of the Government, or whether it be, on the contrary, destructive, as a treaty may well be, of the principles of the Constitution, the rights of the people, or the fundamental interests of the Government. This should be the privilege of the House of Representatives on this subject."³²

The House at that time vigorously asserted its right to participate in such a treaty, and inserted in the preamble of the bill which it passed a provision that "the subjects embraced in the treaty are among those which by the Constitution are submitted to the power of Congress, and over which Congress has jurisdiction, and for these reasons it is necessary that the consent of Congress

³¹ Sparks' Washington, vol. XI, 115-117.

³² Globe, 2 Sess., 40 Cong., 1867-8; appendix, part 5, p. 385.

should be given to the said stipulations before the same can have full force and effect." This was a declaration by the House that it considered its approval of the treaty as necessary, and that the whole matter was to be determined by both branches of Congress. Such advanced ground on the question had not theretofore been taken, and the Senate refused to agree to the position of the House.

The question finally went to a committee of conference, which compromised the conflicting contentions by recommending the following as a substitute for the preamble of the House: "*Whereas the President had entered into a treaty with the Emperor of Russia, and the Senate thereafter gave its advice and consent to said treaty, . . . and whereas said stipulations can not be carried into full force and effect, except by legislation to which the consent of both Houses of Congress is necessary, therefore be it enacted that there be appropriated,*" etc.

While the House of Representatives did not secure the full recognition it desired and was not permitted to maintain the position it had taken in its preamble, the recognition it won from the Senate greatly strengthened its stand on the constitutional question involved and established a valuable precedent in its favor.

A distinguished American statesman and writer in referring to this controversy between the Senate and House says: "The issue between the Senate and the House, now adjusted by a compromise, is an old one, agitated at different periods ever since the controversy over the Jay treaty in 1794-95. It is simply whether the House is bound to vote for an appropriation to carry out a treaty constitutionally made by the President and the Senate, without judging for itself whether, on the merits of the treaty the appropriation should be made. After the appropriation required under the Jay treaty had been voted by the House, that body declared, in a resolution which was adopted by *ayes* 57, *nays* 35, "that it is the constitutional right and duty of the House of Representatives, in all such cases, to deliberate on the expediency or inexpediency of carrying such treaty into effect, and to determine and act thereon as in their judgment may be most conducive to the public good." But that was

the declaration of the House only; whereas the preamble agreed to in the appropriation of money for the purchase of Alaska contained the assent of both branches. Though the constitutional principle involved may not be considered as one settled beyond a fair difference of opinion, there has undoubtedly been a great advance, since the controversy between the two branches in 1794, in favor of the rights of the House when an appropriation of money is asked to carry out a treaty. The change has been so great indeed that the House would not now in any case consider itself under a constitutional obligation to appropriate money in support of a treaty, the provisions of which it did not approve. It is therefore practically true that all such treaties must pass under the judgment of the House as well as under that of the Senate and the President."²³

During the administration of Washington both Marshall and Jefferson foresaw that the contention of the House of Representatives concerning treaties was right. In November, 1795, Jefferson wrote Madison, "Marshall has hitherto been able to do more mischief acting under the mask of Republicanism than he will be able to do after throwing it plainly off. His lax, lounging manners have made him popular with the bulk of the people of Richmond, and profound hypocrisy with many thinking men of our country. . . . His doctrine that the whole commercial part of the treaty (and he might have added the whole unconstitutional part of it) rests in the power of the H. of R., is certainly the true doctrine; and as the articles which stipulate what requires the consent of the three branches of the legislature must be referred to the H. of R. for their concurrence, so they, being free agents, may approve or reject them, either by a vote declaring that, or by refusing to pass acts. I should think the former mode the most safe and honorable."^{23a}

In the following month Jefferson wrote to W. B. Giles: "Randolph seems to have hit upon the true theory of our Constitution, that when a treaty is made involving matters confided by the Constitution to the three branches of the legislature, conjointly, the representatives are as

²³ Blaine's *Twenty Years in Congress*, vol. 2, 337, 338.

^{23a} Ford's *Jefferson*, vol. 7, 30, 38.

free as the President and Senate were to consider whether the national interest requires or forbids their giving the forms and force of law to the articles over which they have a power.’^{33b}

In March, 1796, in a letter to Monroe, Jefferson expressed himself with still greater emphasis on this subject, as follows: “The British treaty has been formally at length laid before Congress. All America is on tip-toe to see what the House of Representatives will decide on it. We conceive the constitutional doctrine to be that though the President and Senate have the general power of making treaties, yet whenever they include in a treaty matters confided by the Constitution to the three branches of the legislature, an act of legislation will be requisite to confirm these articles, and that the House of Representatives, as one branch of the legislature, are perfectly free to pass the act or to refuse it, governing themselves by their own judgment whether it is for the good of their constituents to let the treaty go into effect or not. On the precedent now to be set will depend the future construction of our Constitution, and whether the powers of legislation should be transferred from the President, Senate, and House of Representatives to the President, Senate and Piamingo or any other Indian, Algerine or other chief.’^{33c}

The contention of the House of Representatives that when a treaty calls for an appropriation it is not completed until it has passed each branch of Congress, and is a proper subject for its consideration and action found judicial sanction in the language of Justice-McLean, who said: “A treaty was not, and can not be the supreme law of the land, where the concurrence of Congress is necessary to give it effect. Until this power is exercised, as where the appropriation of money is required, the treaty is not perfect. It is not operative, in the sense of the Constitution, as money cannot be appropriated by the treaty-making power. . . . In such a case the representatives of the people and the States exercise their own judgments in granting or withholding the money. They act on their own responsibility, and not upon the

^{33b} Ford's Jefferson, vol. 7, 41.

^{33c} Ford's Jefferson, vol. 7, 67, 68.

responsibility of the treaty-making power. It can not bind or control the legislative action in this respect, and every foreign government may be presumed to know, that so far as the treaty stipulates to pay money, the legislative sanction is required."⁸⁴

The right of Congress, or either branch thereof, to call upon the heads of the department, in other words upon cabinet officers, to transmit to them such papers and information relating to public matters, as come under their supervision, has from time to time been a subject of consideration by Congress and the respective branches thereof as well as the President and the heads of the departments since the early days of the government.⁸⁵

⁸⁴ *Turner v. Amer. Baptist Miss. Union*, 5 McLean, 344, 347, 348.

⁸⁵ Mr. Jefferson has left the following very interesting account of the action of the President in reference to the request of the House:

"March 31st. A meeting at the President's; present Thomas Jefferson, Alexander Hamilton, Henry Knox, and Edmund Randolph. The subject was the resolution of the House of Representatives, of March 27th to appoint a committee to inquire into the causes of the failure of the late expedition under Major General St. Clair, with the power to call for such persons, papers, and records, as may be necessary to assist their inquiries. The committee had written to Knox for the original letters, instructions, etc. The President had called us to consult, merely because it was the first example, and he wished that so far as it should become a precedent, it should be rightly conducted. He neither acknowledged nor denied, nor even doubted the propriety of what the House were doing, for he had not thought upon it, nor was acquainted with subjects of this kind; he could readily conceive there might be papers of so secret a nature, as that they ought not to be given up. We were not prepared, and wished time to think and inquire.

"April 2nd. Met again at the President's, on the same subject. We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the executive ought to communicate such papers as the public good would permit, and ought to refuse those the disclosure of which would injure the public; consequently we're to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the head of a department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President."

"Hamilton agreed with us in all these points except as to the power of the House to call on heads of departments. He observed that as to his department the act constituting it had made it subject to Congress in some points, but he thought himself was not so far sub-

During the closing days of President Roosevelt's administration the Senate passed and sent to the Attorney-General the following resolution: "Resolved, that the Attorney-General be and he is hereby directed to inform the Senate, whether legal proceedings under the act of July 2, 1890, have been instituted by him or by his authority against the United States Steel Corporation on account of the absorption by it in the year 1907 of the Tennessee Coal & Iron Company, and if no such proceedings have been instituted state the reason for such non-action." This resolution was transmitted by the Attorney-General to the President, who thereupon sent a message to the Senate in which he stated, "As to the transaction in question, I was personally cognizant of and responsible for its every detail." He further said in his message, "I have given to the Senate all the information in the possession of the Executive Department which appears to me to be material or relevant on the subject of the resolution. I feel bound, however, to add that I have instructed the Attorney-General not to respond to that portion of the resolution which calls for a statement of his reasons for non-action. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department or demand from him reasons for his action. Heads of the executive departments are subject to the Constitution, and to the laws passed by the Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction whatever."²⁸

It will be observed that the President said that heads of the executive departments—by which he meant cabinet officers—are subject, "first, to the Constitution; second, to the laws passed by Congress in pursuance of the Con-

ject as to be obliged to produce all papers they might call for. They might demand secrets of a very mischievous nature. Here I saw that he began to fear they would go to examining how far their own members and other persons in the government had been dabbling in stocks, banks, etc. . . . It was agreed in this case that there was not a paper which might not be properly produced, that copies only should be sent, with an assurance that if they should desire it, a clerk should attend with the originals to be verified by themselves." Ford's Jefferson, vol. 1, 189, 190.

²⁸ Cong. Record, January 7, 1909, 591, 593.

stitution, and third, to the directions of the President of the United States, but to no other direction whatever." This was a denial by the President of any right in either the Senate or the House of Representatives to direct, or request the heads of departments to furnish such papers or information to either branch of Congress as it might call for. As the result of this message there was introduced into the Senate the following resolution:

Resolved, That any and every public document, paper, or record, or copy thereof, on the files of any department of the Government relating to any subject whatever, over which Congress has any grant of power, jurisdiction, or control, under the Constitution, and any information relative thereto within the possession of the officers of the department, is subject to the call or inspection of the Senate for its use in the exercise of its constitutional powers and jurisdiction.²⁷

The President shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.

When the appointing power of the Executive came up in the Convention it was a very interesting and important subject and it has continued to be so until the present time. It was an occasion in the Convention for Mr. Mason to make one of his strong speeches, for he was very much in earnest and very much opposed to conferring such power upon the Executive. He said:

"The Executive may refuse its assent to necessary measures, till new appointments shall be referred to him; and, having by degrees engrossed all these into his own hands, the American Executive, like the British, will by bribery and influence save himself the trouble and odium of exerting his negative afterwards. We are, Mr. Chairman, going very far in this business. We are not indeed constituting a British government, but a more dangerous monarchy, an elective one. We are introducing a new

²⁷ Cong. Record, January 16, 1909. Resolution of Senator Bacon.

principle into our system and not necessary, as in the British government, where the Executive has greater rights to defend. Do gentlemen mean to pave the way to hereditary monarchy? Do they flatter themselves that the people will ever consent to such an innovation? If they do, I venture to tell them, they are mistaken. The people never will consent. And do gentlemen consider the danger of delay, and the still greater danger of a rejection, not for a moment, but forever, of the plan which shall be proposed to them? Notwithstanding the oppression and injustice experienced among us from democracy, the genius of the people is in favor of it; and the genius of the people must be consulted." He could not but consider the Federal system as in effect dissolved by the appointment of this Convention to devise a better one. "And do gentlemen look forward to the dangerous interval between extinction of an old, and the establishment of a new government, and to the scenes of confusion which may ensue?" He hoped that nothing like a monarchy would ever be attempted in this country. A hatred to its oppressions had carried the people through the late Revolution. "Will it not be enough to enable the Executive to suspend offensive laws, till they shall be coolly revised, and the objections to them overruled by a greater majority than was required in the first instance?" He never could agree to give up all the rights of the people to a single magistrate. If more than one had been fixed on, greater powers might have been entrusted to the Executive.³⁸

Franklin sustained him in a shorter, but not less effective speech. "No new appointment," he said, "would be suffered, as heretofore in Pennsylvania, unless it be referred to the Executive; so that all profitable offices will be at his disposal. The first man put at the helm will be a good one. Nobody knows what sort may come afterwards. The Executive will be always increasing here, as elsewhere, till it ends in a monarchy."³⁹

This clause confers upon the President the power to nominate, that is, to select the name of a person whom he wishes to appoint to an office and send it to the Senate,

³⁸ Journal, 105, 106.

³⁹ Journal, 106.

which body may confirm, or reject it, for it can not in the first instance make the nomination.

In defending the wisdom of the Convention in placing the appointing power to the important offices in the President alone, Mr. Hamilton said: "The sole and undivided responsibility of one man will naturally beget a livelier sense of duty, and a more exact regard to reputation. He will, on this account, feel himself under stronger obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them. He will have *fewer* personal attachments to gratify than a body of men who may each be supposed to have an equal number, and will be so much the less liable to be misled by the sentiments of friendship and of affection. There is nothing so apt to agitate the passions of mankind as personal considerations, whether they relate to ourselves or to others, who are to be the object of our choice or preference. Hence in every exercise of the power of appointing to offices by an assembly of men, we must expect to see a full display of all the private and party likings and dislikes, partialities and antipathies, attachments and animosities, which are felt by those who compose the assembly. The choice which may at any time happen to be made under such circumstances will of course be the result either of a victory gained by one party over the other, or of a compromise between the parties. In either case, the intrinsic merit of the candidate will be too often out of sight. In the first, the qualifications best adapted to uniting the suffrages of the party will be more considered than those which fit the person for the station. In the last the coalition will commonly turn upon some interested equivalent. 'Give us the man we wish for this office, and you shall have the one you wish for that.' This will be the usual condition of the bargain. And it will rarely happen that the advancement of the public service will be the primary object either of party victories, or of party negotiations."⁴⁰

⁴⁰ The Federalist No. 76.

President John Adams said: "While the Senate of the United

The expression "by and with the advice and consent of the Senate," is a repetition of the phrase which appears in the first part of this clause, and in both instances means consent or agreement to a nomination rather than advice. The President seldom if ever gets the advice of the Senate in advance of making a nomination for an office. Sometimes if he has doubt whether his nomination will be confirmed by the Senate, he diplomatically ascertains that fact, but such instances are rare and the expression "with the advice and consent of the Senate" is not a happy one for that reason. In reference to treaties the instrument is generally prepared by the Secretary of State and sent to the Senate in the form in which the President desires it, and very few, if any, of the Senators have given any "advice" concerning it. Certainly the Senate as a body has never seen it or been familiar with its provisions. In practice the same conditions exist as to a nomination.

Attorney-General Cushing in an opinion delivered to the Secretary of State, Mr. Marcy, in 1855, held, "The expression, 'Ambassadors and other Public Ministers' (which occurs three times in the Constitution) must be understood as comprehending all officers having diplomatic functions, whatever their title or designation; and that the President therefore has power under the Constitution to appoint diplomatic agents of the United States at any rank, at any place, and at any time, in his discretion, but always subject to the constitutional restraints of the Senate. The power to make such appointments is not limited by or derived from Congress, except so far as appropriations of money are necessary to provide means for defraying the expenses of the appointment."⁴¹

The same Attorney-General subsequently advised the Secretary of State that the term "Consul," as used in

States have a negative on all appointments to office we can never have a national President. In spite of his own judgment he must be the President, not to say the tool of a party. In Massachusetts the Legislature annually elect an executive council, which renders the Governor a mere Doge of Venice, a mere *testa di legno*, a mere head of wood. Strait is the gate and narrow is the way that leads to liberty and few nations, if any, have found it." *Life and Writings of John Adams*, vol. 10, 397.

⁴¹ 7 Op. A. G., 186.

the Constitution, is a generic designation of a class of public officers existing by public law and recognized by treaties, appointed by their governments to reside in foreign countries and especially in seaports and other convenient points to discharge administrative and sometimes judicial functions in regard to their fellow-citizens, merchants, mariners, travelers, and others, who dwell or happen to be in such place; to aid by the authentication of documents abroad in the collection of the public revenue, and generally to perform such other duties as may be assigned to them by the laws and orders of the government. Congress can not by legislative act appoint or remove consuls, any more than ministers; but it may increase at will the descriptions of consular officers, or enlarge or diminish their functions, or regulate their compensation, and it may distinguish between some officers appointable with advice of the Senate, and others appointable by the President alone, or by a head of department."⁴²

It is exclusively the province of the President, by and with the advice and consent of the Senate, to appoint consular officers, but Congress may invest the appointment of *inferior* consular officers in the President exclusively, or in the Secretary of State.⁴³

Mr. Justice Miller, in *United States v. Germaine*,⁴⁴ said: "The Constitution for purposes of appointment very clearly divides all its officers into two classes. The primary class requires a nomination by the President and confirmation by the Senate. But foreseeing that when officers became numerous, and sudden removals necessary, this mode might be inconvenient, it was provided that, in regard to officers inferior to those specially mentioned, Congress might by law vest their appointment in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt."

⁴² 7 Op. A. G., 248.

⁴³ 7 Op. A. G. 242.

⁴⁴ 99 U. S., 509.

Later in the case of *United States v. Mouat*,⁴⁵ it was held by Mr. Justice Miller: "Unless a person in the service of the government holds his place by virtue of an appointment by the President, or one of the courts of justice, or heads of departments, authorized by law to make such appointment, he is not strictly speaking an officer of the United States."

Illustrations of who are not officers.—A clerk of collector is not a United States officer.⁴⁶ Nor is a special agent of the General Land Office.⁴⁷ Nor is a merchant appraiser.⁴⁸ Nor is a surgeon, who is appointed by the Commissioner of Pensions to examine applicants for pensions.⁴⁹ Nor is the cashier of a mint appointed by the superintendent thereof.⁵⁰ But letter-carriers appointed by the Postmaster General in pursuance of Congressional legislation, who give bond and are sworn for the faithful discharge of their duties, are officers of the United States.⁵¹

There are four elements that enter into the term "office," tenure, duration, emolument, and duties, and an office is a public station or employment conferred upon a person by the appointment of the government.⁵²

But the Congress may by Law vest the Appointment of such inferior Officers as they think proper in the President alone, in the Courts of Law, or in the Heads of the Departments.

This clause, as we have already noticed, divides the officers of the government into two classes. The first class are those which must be appointed by the President. They consist of the higher grade of officers, foreign representatives, judges of the Supreme Court and others. The second class are designated by the Constitution as inferior officers. Congress may authorize the appointment of these officers, first in the President alone, second in the courts of law, or third in the heads of the departments.

⁴⁵ 124 U. S., 307.

⁴⁶ *United States v. Smith*, 124 U. S., 525.

⁴⁷ *United States v. Schlierholz*, 133 Fed. Rep., 333.

⁴⁸ *Auffmordt v. Hedden*, 137 U. S., 326.

⁴⁹ *United States v. Germaine*, 99 U. S., 512.

⁵⁰ *United States v. Cole*, 130 Fed. Rep., 614.

⁵¹ *United States v. McCrory*, 91 Fed. Rep., 296.

⁵² *United States v. Hartwell*, 6 Wall. 393.

It is necessary for a proper understanding of this provision to know what is meant by the term "inferior officers." Fortunately this expression has come under judicial construction. It was held by the Court of Claims that "It would be impossible to define, except arbitrarily, the meaning of the words, 'inferior officers,' in their application to officers of the different branches of the public service who have no official relation to each other, and it would not be easy to separate all the officers of the government into two classes and draw a satisfactory line which would divide the inferior, in the sense in which it is claimed that word is used, from those of the higher class, nor is it necessary to attempt to do either. In our opinion, the words as used in connection with the other language of the same clause, have a plain, definite and intelligible meaning, capable of unmistakable application to effect the purposes of that provision of the Constitution. Having specified certain officers, ministers, consuls and judges of the Supreme Court who shall be nominated by the President and appointed by and with the advice and consent of the Senate in all cases, the Constitution leaves it to Congress to vest in the President alone, the courts of law, or the heads of departments the appointment of any officer inferior or subordinate to them respectively, whenever Congress thinks proper so to do. Thus it may authorize the President or the head of the War Department to appoint an army officer, because the officer to be appointed is inferior to the one thus vested with the appointing power. The word 'inferior' is not here used in that vague, indefinite, and quite inaccurate sense which has been suggested—the sense of petty or unimportant; but it means subordinate or inferior to those officers in whom respectively the power of appointment may be vested—the President, the courts of law, and the heads of departments."⁵³

As a matter of practice it is seldom that the President appoints an inferior officer, but such appointments are generally made by the heads of departments.

It was held in *Rice v. Ames*,⁵⁴ that an act of Congress which authorized United States judges to appoint commis-

⁵³ *Collins v. U. S.*, 14th Court of Claims, 568, 574.

⁵⁴ 180 U. S., 378.

sioners was constitutional and that such courts had the power of making such appointments.

The expression "heads of departments" underwent judicial consideration in *United States v. Germaine*,⁵⁵ where it was held: "The Constitution intended to inaugurate a new system of government and the departments to which it referred were not then in existence. The word 'department' as found in article 2, section 2, of the Constitution relates to the Executive, and there is reference to the subdivision of the power of the Executive into departments, for the more convenient exercise of that power. Congress recognized this in the act creating these subdivisions of the executive branch by giving to each of them the name of a department; hence we have the Secretary of State, who is the head of the Department of State, and the departments of War, Interior, Treasury, etc. The association of the words 'heads of departments' with the President and the courts of law strongly implies that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of departments. The word 'department' as used in this connection, and the term 'principal officer' as used in connection with the Executive Department, clearly mean the same thing and are equivalent to each other. So that an appointment made by a head of a department—which ordinarily means a cabinet officer—is a constitutional appointment." "The last designation of the power was no doubt," said Mr. Justice Thompson, in *Ex parte Hennen*,⁵⁶ "intended to be exercised by the department of the government to which the officer to be appointed most appropriately belongs."

The heads of departments may abolish an office and discontinue the appointment, though the appointee may have been appointed for a fixed time and by and with the advice and consent of the Senate.⁵⁷

The appointment to be a clerical position in the government involves the exercise of judgment, and it is therefore not a ministerial duty only, and where the head of a

⁵⁵ 99 U. S., 510.

⁵⁶ 13 Peters, 258.

⁵⁷ *Ware v. United States*, 4 Wall., 633.

department removes an inferior officer the action will not be reviewed by the court. It is the appointing power which must determine the fitness of the applicant to discharge the duties of his position, and in such a case as with the President the power of removal from an office is incident to the power of appointing to it.⁵⁵

Another unfortunate omission in this section relates to the removal of officers. The Constitution does not state who shall have this power. In the very beginning of the government this was an important as well as an interesting question. The omission of the Constitution in this regard did not escape attention or criticism after it had been submitted for ratification, and was made the basis of attack upon it by those who opposed it.

Mr. Hamilton took the view that the power of removal from office should be exercised jointly by the President and the Senate. In the *Federalist* he states the principal objections to this view, and then proceeds to answer them. "It has been mentioned," he says, "as one of the advantages to be expected from the co-operation of the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint. A change of the Chief Magistrate, therefore, would not occasion so violent or so general a revolution in the officers of the Government as might be expected, if he were the sole disposer of offices. Where a man in any station had given satisfactory evidence of his fitness for it, a new President would be restrained from attempting a change in favor of a person more agreeable to him by the apprehension that the discountenance of the Senate might frustrate the attempt, and bring some degree of discredit upon himself. Those who can best estimate the value of a steady administration will be most disposed to prize a provision, which connects the official existence of public men with the approbation or disapprobation of that body, which, from the greater permanency of its own composition, will in all probability be less subject to inconstancy than any other member of the Government. To this union of the Senate with the President, in the article of appointments, it has in some cases been

⁵⁵ *Keim v. United States*, 177 U. S., 293.

objected, that it would serve to give the President an undue influence over the Senate; and in others, that it would have an opposite tendency; a strong proof that neither suggestion is true."⁵⁹

Mr. Madison took the opposite view and maintained that the power of removal belonged to the President, but said, "The wanton removal of meritorious officers by the President, without cause, would be ground for impeaching him."⁶⁰

In the First Congress when a bill for the establishment of one of the executive departments of the Government was under consideration it contained the words, "To be removable from office by the President of the United States." It was moved to strike out this language, and that motion was the cause of a prolonged and earnest debate. On the one hand it was claimed that the right to remove officials belonged to the President, as he had the right in the first instance to appoint them. On the other hand it was claimed that as the Senate had to confirm the appointments that body should be consulted as to their removal. The motion was finally defeated and the bill, with the objectionable language in it, passed the House of Representatives by a vote of thirty-four in favor of it as against twenty in opposition to it. In the Senate the vote was a tie, and the Vice-President gave the casting vote in favor of the bill.⁶¹

⁵⁹ The Federalist No. 77.

⁶⁰ Story on the Constitution, Vol. 2, 367; 1 Lloyd's Debates 503.

⁶¹ Tucker on the Constitution, 733.

The following is an account of the decision of Vice-President Adams, during the First Congress, on casting the deciding vote in the Senate on the bill to create an executive department and to make the incumbent subject to "removal at the will of the President":

"The first instance in which opposition developed itself by close divisions in both Houses occurred in the case of the law proposed to organize the Department of Foreign Affairs. The question most earnestly disputed turned upon the power vested by the Constitution in the President to remove the person at the head of that bureau, at his pleasure. One party maintained it was an absolute right. The other insisted that it was subject to the same restriction of a ratification by the Senate which is required when the officer is appointed. After a long contest in the House of Representatives terminating in favor of the unrestricted construction, the bill came up to the Senate for its approbation.

"This case was peculiar and highly important. By an anomaly

This legislative construction was generally regarded as conclusive of the question and has always subsequently been pointed to as the interpretation of the Constitution by Congress, concerning the power of removal, but this

in the Constitution, which upon any recognized theory it is difficult to defend, the Senate, which in the last resort is made the judicial tribunal to try the President for malversation in office, is likewise clothed with a power of denying him the agents in whom he may choose most to confide for the faithful execution of the duties of his station, and forcing him to select such as they may prefer. If, in addition to this, the power of displacing such as he found unworthy of trust had been subjected to the same control, it can not admit of a doubt that the government must, in course of time, have become an oligarchy, in which the President would sink into a mere instrument of any faction that might happen to be in the ascendant in the Senate. This, too, at the same time that he would be subject to be tried by them for offences in his department, over which he could exercise no effective restraint whatever. In such case, the alternative is inevitable, either that he would have become a confederate with that faction, and therefore utterly beyond the reach of punishment by impeachment at their hands, for offences committed with their privity, if not at their dictation, or else, in case of his refusal, that he would have been powerless to defend himself against the paralyzing operation of their ill-will. Such a state of subjection in the executive head to the legislature is subversive of all ideas of a balance of powers drawn from the theory of the British constitution, and renders probable at any moment a collision, in which one side or the other, and it is most likely to be the legislature, must be ultimately annihilated.

"Yet, however true these views may be in the abstract, it would scarcely have caused surprise if their soundness had not been appreciated in the Senate. The temptation to magnify their authority is commonly all-powerful with public bodies of every kind. In any other stage of the present government than the first, it would have proved quite irresistible. But throughout the administration of General Washington, there is visible among public men a degree of indifference of power and place, which forms one of the most marked features of that time. More than once the highest cabinet and foreign appointments went begging to suitable candidates, and begged in vain. To this fact it is owing that public questions of such moment were then discussed with as much of personal disinterestedness as can probably ever be expected to enter into them anywhere. Yet even with all these favoring circumstances it soon became clear that the republican jealousy of a centralization of power in the President would combine with the *esprit de corps* to rally at least half the Senate in favor of subjecting removals to their control. In such a case the responsibility of deciding the point devolved, by the terms of the Constitution upon Mr. Adams, as Vice-President. The debate was continued from the 15th to the 18th of July, a very long time for that day in an assembly comprising only twenty-

view has not always been submitted to. That the power to remove was not vested exclusively in the President, despite the vote in Congress, had warm and able advocates in the Senate at a later period. Reviewing the discussion which took place on the bill Mr. Calhoun says:

"During the pendency of the bill, a question arose, whether the President, without the sanction of an act of Congress, had the power to remove an officer of the government, the tenure of whose office was not fixed by the Constitution. It was elaborately discussed. Most of the prominent members took part in the debate. Mr. Madison, and others who agreed with him, insisted that he had the power. They rested their argument mainly on the ground, that it belonged to the class of executive powers; and that it was indispensable to the performance of the duty, 'to take care that the laws be faithfully executed.' Both parties agreed that the power was not expressly vested in him. It was, finally, decided that he

two members when full, but seldom more than twenty in attendance. A very brief abstract, the only one that has yet seen the light, is furnished in the third volume of the present work. Mr. Adams appears to have made it for the purpose of framing his own judgment in the contingency which he must have foreseen as likely to occur. The final vote was taken on the 18th. Nine Senators voted to subject the President's power of removal to the will of the Senate; Messrs. Few, Grayson, Gunn, Johnson, Izard, Langdon, Lee, Maclay, and Wingate. On the other hand, nine Senators voted against claiming the restriction; Messrs. Bassett, Carroll, Dalton, Elmer, Henry, Morris, Paterson, Read, and Strong. The result depended upon the voice of the Vice-President. It was the first time that he had been summoned to such a duty. It was the only time, during his eight years of service in that place, that he felt the case to be of such importance as to justify his assigning reasons for his vote. These reasons were not committed to paper, however, and can therefore never be known. But in their soundness it is certain that he never had the shadow of a doubt. His decision settled the question of constitutional power in favor of the President, and consequently established the practice under the government, which has continued down to this day. Although there have been occasional exceptions taken to it in argument, especially at moments when the executive power, wielded by a strong hand, seemed to encroach upon the limits of the coordinate departments, its substantial correctness has been, on the whole, quite generally acquiesced in. And all have agreed, that no single act of the First Congress has been attended with more important effects upon the working of every part of the government." *Life and Works of John Adams*, Vol. 1, 448-450.

had the power—both sides overlooking a portion of the Constitution which expressly provides for the case. I refer to a clause, already cited, and more than once alluded to, which empowers Congress to make all laws necessary and proper to carry its own powers into execution; and also whatever power is vested in the Government, or any of its departments, or officers. And what makes the fact more striking, the very argument used by those who contended that he had the power, independently of Congress, conclusively showed that it could not be exercised without its authority, and that the latter department had the right to determine the mode and manner in which it should be executed. For, if it be not expressly vested in the President, and only results as necessary and proper to carry into execution a power vested in him, it irresistibly follows, under the provisions of the clause referred to, that it cannot be exercised without the authority of Congress. But while it effected this important object, the Constitution provided means to secure the independence of the other departments; that of the executive, by requiring the approval by the President of all the acts of Congress;—and that of the judiciary, by its right to decide definitely, as far as the other departments are concerned, the constitutionality of all laws involved in cases brought before it.

“No decision ever made or measure ever adopted, except the 25th section of the judiciary act, has produced so great a change in the practical operation of the Government as this. It remains, in the face of this express and important provision of the Constitution, unreversed. One of its effects has been to change entirely the intent of the clause in a most important particular. Its main object, doubtless, was to prevent collision in the action of the Government, without impairing the independence of the departments, by vesting *all discretionary power* in the Legislature. Without this, each department would have had equal right to determine what powers were necessary and proper to carry into execution the powers vested in it; which could not fail to bring them into dangerous conflicts, and to increase the hazard of multiplying unconstitutional acts. Indeed, instead of a government, it would have been little less than the *regime* of

three separate and conflicting departments—ultimately to be controlled by the executive; in consequence of its having the command of the patronage and forces of the Union. This is avoided and unity of object and action is secured by vesting all its discretionary power in Congress; so that no department or officer of the Government can exercise any power not expressly authorized by the Constitution or the laws. It is thus made a legal as well as a constitutional Government; and if there be any departure from the former it must be either with the sanction or the permission of Congress. Such was the intent of the Constitution; but it has been defeated, in practice, by the decision in question.

“Another of its effects has been to engender the most corrupting, loathsome and dangerous disease that can infect a popular government—I mean that known by the name of *‘the Spoils.’* It is a disease easily contracted under all forms of government—hard to prevent and most difficult to cure when contracted; but of all the forms of government it is by far the most fatal in those of a popular character. The decision which left the President free to exercise this mighty power according to his will and pleasure—uncontrolled and unregulated by Congress—scattered broadcast the seeds of this dangerous disease throughout the whole system. It might be long before they would germinate—but that they would spring up in time, and if not eradicated that they would spread over the whole body politic a corrupting and loathsome distemper, was just as certain as anything in the future. To expect, with its growing influence and patronage, that the honors and emoluments of the Government, if left to the free and unchecked will of the Executive, would not be brought in time to bear on the presidential election implies profound ignorance of that constitution of our nature which renders governments necessary to preserve society, and constitutions to prevent the abuses of governments.”⁶²

In this view of Mr. Calhoun's, Mr. Webster concurred. In his speech before the National Republican Convention, at Worcester, delivered on the 12th of October, 1832,

⁶² Works of Calhoun, Vol. 1, 345-48.

in speaking upon the subject of removals from office, he said:

"You will remember, sir, that the Constitution says not one word about the President's power of removal from office. It is a power raised entirely by construction. It is a constructive power, introduced at first to meet cases of extreme public necessity. It has now become coextensive with the executive will, calling for no necessity, requiring no exigency for its exercise; to be employed at all times, without control, without question, without responsibility. When the question of the President's power of removal was debated in the First Congress, those who argued for it limited it to *extreme cases*. Cases, they said, might arise in which it would be *absolutely necessary* to remove an officer before the Senate could be assembled. An officer might become insane; he might abscond; and from these and other supposable cases, it was said, the public service might materially suffer if the President could not remove the incumbent. And it was further said that there was little or no danger of the abuse of the power for party or personal objects. No President, it was thought, would ever commit such an outrage on public opinion. Mr. Madison, who thought the power ought to exist and to be exercised in cases of high necessity, declared, nevertheless, that if a President should resort to the power when not required by any public exigency, and merely for personal objects, *he would deserve to be impeached*. By a very small majority—I think, in the Senate, by the casting vote of the Vice-President—Congress decided in favor of the existence of the power of removal, upon the grounds which I have mentioned; granting the power in a case of clear and absolute necessity, and denying its existence everywhere else.

"Mr. President, we should recollect that this question was discussed and thus decided when Washington was in the executive chair. Men knew that in his hands the power would not be abused; nor did they conceive it possible that any of his successors could so far depart from his great and bright example as, by abuse of the power, and by carrying that abuse to its utmost extent, to change the essential character of the Executive from

that of an impartial guardian and executor of the laws into that of the chief dispenser of party rewards. Three or four instances of removal occurred in the first twelve years of the Government. At the commencement of Mr. Jefferson's administration, he made several others, not without producing much dissatisfaction; so much so that he thought it expedient to give reasons to the people in a public paper,⁶³ for even the limited extent to which he had exercised the power."

In a speech on the 12th of October, 1835, in again discussing the subject of removal, Mr. Webster said: "I confess my judgment would have been that the power of removal did not belong to the President alone; that it was but a part of the power of appointment, since the power of appointing one man to office implies the power of vacating that office by removing another out of it; and as the whole power of appointment is granted, not to the President alone, but to the President and Senate, the true interpretation of the Constitution would have carried the power of removal into the same hands."⁶⁴ This, as we have already seen, was the doctrine of Hamilton..

The question seems to have first come before the Supreme Court in *Ex parte Hennen*,⁶⁵ and was decided by that body in 1839, upon the following facts: Congress passed an act authorizing district judges to appoint the clerk of the court; a district judge exercised this right under the statute and appointed a clerk and thereby removed the one who was at the time filling the position. In the communication notifying the clerk of his removal and the appointment of his successor the judge said: "that the business of the office for the last two years had been conducted promptly, skilfully, and uprightly, and that in appointing Mr. Winthrop to succeed him, he had been actuated purely by a sense of duty and feelings of kindness towards one whom he had long known, and between whom and himself the closest friendship had ever subsisted." The right of the district judge to make this appointment was questioned and a difference of opinion

⁶³ Webster's Works, Vol. 1, 258-60.

⁶⁴ Webster's Works, Vol. 1. 335.

⁶⁵ 13 Peters, 230.

between him and the presiding justice of the Supreme Court of the United States having been certified the question was heard by the Supreme Court of the United States. Mr. Justice Thompson, page 259, observed: "It cannot, for a moment, be admitted, that it was the intention of the Constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment. This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related, however, to the power of the President to remove officers appointed with the concurrence of the Senate; and the great question was, whether the removal was to be by the President alone, or with the concurrence of the Senate, both constituting the appointing power. No one denied the power of the President and Senate jointly to remove, where the tenure of the office was not fixed by the Constitution; which was a full recognition of the principle that the power of removal was incident to the power of appointment. But it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone. And such would appear to have been the legislative construction of the Constitution."

In *Crenshaw v. United States*,⁶⁶ Mr. Justice Lamar, for the Court remarked: "A statute under which one takes office, which fixes the term of office at one year, or during good behavior, is the same as one which adds to those provisions the declaration that the incumbents shall not be dismissed therefrom. The officer under it does not hold by contract. He enjoys a privilege revocable by the sovereignty at will; and one legislature cannot deprive its successor of the power of revocation."

In *Parsons v. United States*,⁶⁷ President Cleveland direct-

⁶⁶ 134 U. S., 108. *United States v. McDonald*, 128 U. S., 473.

⁶⁷ 167 U. S., 324.

ed the following communication to Lewis E. Parsons, Jr., District Attorney at Birmingham, Alabama:

“Executive Mansion,

“Washington, D. C., May 26, 1893.

“Sir: You are hereby removed from the office of Attorney of the United States for the Northern and Middle Districts of Alabama, to take effect upon the appointment and qualification of your successor.

“Grover Cleveland.”

No charges had been preferred against the District Attorney, consequently it was not claimed that he was incapable of discharging the duties of the office, or that there was any cause for his removal. The district attorney replied to the President's communication as follows:

“My commission bears date of February 4, 1890, and authorizes me to hold said office for the definite term of four years from the date thereof, fixed by law, and I am advised by counsel, and it is my own opinion, that you have no power to remove me, and I respectfully decline to surrender the office.

“Very respectfully,

“Lewis E. Parsons, Jr.,

“United States Attorney for the Northern District of Alabama.”

In deciding the case Mr. Justice Peckham said (p. 327): “The question here presented is whether the President of the United States has power to remove a district attorney, who had been duly appointed, when such removal occurs within the period of four years from the date of his appointment, and to appoint a successor to that officer by and with the advice and consent of the Senate.” It was claimed on the part of the district attorney that the President did not possess such power and that he was entitled to serve as such officer for the period of four years. Mr. Justice Peckham, in his opinion, reviewed the history of the subject of removal from office from the debate which occurred in the first session of Congress in 1789 until the last decision by the Supreme Court. The result reached was that the President can remove

a district attorney though such removal falls within the period of four years after his appointment and though he was appointed "by and with the advice and consent of the Senate" and his successor must be appointed "by and with the advice and consent of the same body." The court further held that the language of the statute that district attorneys shall be appointed for a term of four years, and their commissions shall cease and expire at the expiration of four years, means that the term should not last longer than four years and that during that time the President could remove them if he saw fit to do so.

The last case arose on these facts. A statute provided that the President by and with the advice and consent of the Senate should appoint general appraisers of merchandise . . . who may be removed from office at any time by the President for inefficiency, neglect of duty or malfeasance in office."

President McKinley sent the following communication to one of these appraisers:

"Executive Mansion,

"Washington, D. C., May 3, 1899.

"Sir: You are hereby removed from the office of general appraiser of merchandise, to take effect upon the appointment and qualification of your successor.

"William McKinley."

The officer resisted the attempt to remove him and brought suit for the recovery of his salary. He never resigned his office nor acquiesced in any attempted removal therefrom, and was never notified or informed of any charges made against him, either of inefficiency, neglect of duty or malfeasance in office, and he knew of no cause for his removal from the office having been ascertained or assigned by the President. It will be seen that this case presented the question whether or not the President could at will, and without assigning a cause therefor, remove an officer, when the statute under which he was appointed provided the causes for which he might be removed. The court held he could. Mr. Justice Peckham again delivered the opinion of the

court and said (p. 317): "In making removals from office it must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed, and we think it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient. . . . It is true that under this construction it is possible that officers may be removed for causes unconnected with the proper administration of the office. That is the case with most of the other officers in the Government. The only restraint in cases such as this must consist in the responsibility of the President under his oath of office, to so act as shall be for the general benefit and welfare. . . . The right of removal would exist as inherent in the power of appointment unless taken away in plain and unambiguous language" (p. 318).

But if a statute provides the grounds upon which the officer may be removed he is entitled to notice and hearing, if his removal is based upon one of those grounds. Congress could attach such conditions to the removal of an officer as it would seem proper, and it could provide that the officer could only be removed for the causes stated and for no other and after a hearing, but it would require in a case of inferior officers clear and explicit language in the statute to deprive the President of his right of removal, for that right seems to be inherent in the right to appoint to office.⁶⁸

It was held in *United States v. Perkins*, "When Congress vests the appointment of an inferior officer in the head of a department it may limit and restrict the power of removal as it thinks best for the public interests. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict and regulate the removal by such laws as Congress may pass relative thereto. The head of the department has no constitutional prerogative of appointment to offices independently of congressional action and he must be gov-

⁶⁸ *Shurtleff v. United States*, 189 U. S., 312, 318, 317.

erned not only in making appointments, but in all that is incident thereto.”⁹⁹

These cases must be considered as establishing the principle that the President, at his pleasure, can remove an officer other than a judge, and is under no obligation to assign a reason for doing so. This doctrine is a long distance from the opinion of Hamilton, and of Madison, when the latter said, “that a wanton removal of an officer by the President without just cause would be grounds for impeaching and removing the President.” But that was at the very beginning of the republic, and the doctrine which we have been discussing is one of the evolutions of the Constitution in the progress of the country; and while the conclusion of the courts vastly increases the influence of the Executive and confers power upon him far beyond the express contemplation of the Constitution, and contrasts strangely with the teachings of the fathers of the republic, it would be difficult to show that it was not correct. Unless the power to remove an officer other than a federal judge is lodged somewhere he would necessarily hold for life, and nothing could be more repugnant to the Constitution, or to the spirit of our republic and our institutions than this. The misfortune is that the Constitution does not determine who shall remove officers. But the doctrine that the removal of an officer is incident to his appointment is no more violent than the doctrine that an officer once appointed could never be removed, and the question seemed ultimately to come to this, and it was between these two conclusions that the court was to decide.

⁹⁹ 116 U. S., 485.

CHAPTER XXXVIII.

THE EXECUTIVE, CONTINUED.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

This clause was moved by Mr. Spaight while the Convention was considering the subject of the Executive, and was adopted by the Convention without change and reported without change by the Committee on Style.¹ The provision was doubtless taken from the Constitution of North Carolina, which contained a similar clause.

This clause confers upon the President the power to make temporary appointments, or what are called "recess appointments." Such appointments cannot be made unless a vacancy actually exists. An office newly created which had not been filled is not a vacancy within this provision.²

In the above case, Peele, J. (p. 136), said: "The language of the Constitution 'to fill up all vacancies that may happen during the recess of the Senate,' necessarily implies, not only the previous existence of an office, but that 'during the recess of the Senate' a vacancy happened therein, which could be filled by the President by commission to expire at the end of the next session of Congress." On principle the President cannot create a vacancy, by removing the occupant of an office for the purpose of filling it, but if he chose to do so it would be difficult to challenge his motive or prove his purpose.

When must vacancy occur?—In an opinion rendered by Attorney General Taney, he said: "It has been contended that, in order to enable the President to make the appointment, the vacancy must take place during the recess;

¹ Journal, 681.

² Peck v. United States, 39 Court of Claims, 125.

in other words, that the office must be 'filled at the time of the adjournment of the Senate, and become vacant afterwards. I cannot think that this is the true interpretation of the article in question. The Constitution was formed for practical purposes, and a construction that defeats the very object of the grant of power cannot be the true one. It was the intention of the Constitution that the offices created by law, and necessary to carry on the operation of the Government, should always be full, or at all events the vacancy should not be a protracted one.'*

This provision was given consideration by Attorney General Stanbery. In his opinion he said: "As some claim that the vacancy does not happen within the meaning of the Constitution, before the recess, I propose to consider the general question, whether the President can fill up a vacancy in the recess which existed in the prior session. I am not aware of any decision of the Supreme Court that has any direct bearing upon this question. It has, however, frequently been passed upon by my predecessors. Mr. Wirt in 1823, Mr. Taney in 1833 and Mr. Legare in 1841 concurred in opinion that vacancies first occurring during the session of the Senate may be filled by the President in the recess." Mr. Mason, in a short opinion given in 1845, held that vacancies known to exist during the session could not be filled in the recess; but in a more elaborate opinion written in 1846, he expresses general concurrence with his three predecessors.

In his opinion Attorney General Stanbery (p. 38) said: "The true theory of the Constitution in this particular seems to me to be this: that as to the executive power, it is always to be in action or in capacity for action; and that, to meet this necessity, there is a provision against a vacancy in the chief executive office, and against vacancies in all the subordinate offices, and that at all times there is a power to fill such vacancies. It is the President whose duty it is to see that the vacancy is filled. If the Senate is in session they must assent to his nomination. If the Senate is not in session, the President fills the vacancy alone. All that is to be looked to is, that there is a vacancy, no matter when it first occurred, and there

* 2nd Op. A. G., 526, 527.

must be power to fill it. If it should have been filled whilst the Senate was in session, but was not then filled, that omission is no excuse for longer delay, for the public exigency which requires the officer may be as cogent, and more cogent, during the recess than during the session. I repeat it, wherever there is a vacancy there is a power to fill it. This power is in the President, with the assent of the Senate whilst that body is in session, and in the President alone when the Senate is not in session. There is no reason upon which the power to fill a vacancy can be limited by the state of things when it first occurred."

"I am accordingly of opinion (page 42) that the President has full and independent power to fill vacancies in the recess of the Senate, without any limitation as to the time when they first occurred."⁴

This doctrine was affirmed in an opinion by Attorney General Devens in which all the preceding cases were examined and commented upon.⁵

"Vacancies that may happen during the recess of the Senate" are equivalent to "vacancies that may happen to exist during the recess of the Senate."⁶

Recess of the Senate.

There is some ambiguity in this language arising from the use of the term "recess," though if a single word was to be employed it is doubtful if any could be used which would be more explicit. Taking the word in connection with the entire clause in which it is found and also in connection with the power of appointment conferred upon the President, it is evident that the Convention meant that the President should make appointments during the time the Senate should not be in regular session. Not to confer this power upon the President—in other words, to have provided that vacancies could be filled only when the Senate *was in session*—might very seriously have crippled the administration of the government. It cannot be that any such intention was in the

⁴ 12 Op. A. G., 32-42.

⁵ 16 Op. A. G., 522.

⁶ In re Farron, 3 Fed. Rep., 112.

minds of the framers of the Constitution. Their express declaration is to the contrary. The difficulty—if there is any—is in the use of the term “recess.” We are accustomed to think of that term as meaning a short cessation from some regular occupation, a suspension of regular work for a short time. Had the Constitution said that “the President shall fill up all vacancies that may happen while the Senate is not in regular session, or during the adjournment of the Senate or between the adjournment of the Senate and its next regular meeting,” there could hardly have been any doubt concerning what was meant. As it is, the term “recess” means the period of time between the adjournment of the session of the Senate and its next regular meeting. There are two *regular* adjournments of the Senate during each term of Congress. One is fixed by agreement between the two houses of Congress. The other is fixed by law. The “recess” refers to the time after each of these adjournments until Congress meets again.

“Recess of the Senate” does not mean the holiday adjournment of the Senate, and the President is not justified in making a recess appointment during that time.

The term “recess” was held by Attorney General Knox to mean “the period after the final adjournment of Congress for the session, and before the next session begins.” Whereas, “an adjournment during a session of Congress means merely a temporary suspension of business from day to day, or, when exceeding three days, for such brief periods over holidays as are well recognized and established and as are agreed upon by the joint action of the two houses.” But it was held in Arkansas, the term recess was defined to mean the intermission between sittings of the same body at its regular or adjourned session, and not to the interval between the final adjournment of one body and the convening of another at the next regular session. (When applied to a legislative body, it means a temporary dismissal and not an adjournment *sine die*.)⁷

In the 58th Congress the Senate passed a resolution authorizing and instructing the judiciary committee of that

⁷ 23 Op. A. G., 599-601.

⁸ Tipton v. Parker, 71 Ark. 193, 196.

body to report to the Senate what constitutes a "Recess of the Senate," and what are the powers and limitations of the Executive in making appointments in such cases. The committee, through its chairman, Senator Spooner, made the following report:

"The word 'recess' is one of ordinary, not technical signification, and it is evidently used in the constitutional provision in its common and popular sense. It means in Article 2 precisely what it means in Article 3, in which it is again used. Conferring power upon the executive of a State to make temporary appointment of a Senator, it says:

"And if vacancies happen, by resignation or otherwise, during the recess of the Legislature of any State, the executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

"It means just what was meant by it in the Articles of Confederation, in which it is found in the following provision:

"The United States in Congress assembled shall have authority to appoint a committee to sit in the recess of Congress, to be denominated a committee of the States, and to consist of one delegate from each State.

"It was evidently intended by the framers of the Constitution that it should mean something real, not something imaginary; something actual, not something fictitious. They used the word as the mass of mankind then understood it and now understand it. It means, in our judgment, in this connection the period of time when the Senate is *not sitting in regular or extraordinary session as a branch of the Congress, or in extraordinary session for the discharge of executive functions*; when its members owe no duty of attendance; when its chamber is empty; when, because of its absence, it cannot receive communications from the President or participate as a body in making appointments.

"It is easy for a lawyer to comprehend the words "constructive appropriation," "constructive notice," "constructive fraud," "constructive contempt," "constructive damages," "constructive malice," but it would seem

quite difficult for lawyer or layman to comprehend a "constructive recess" of Congress, or of the state legislature, or of the Senate. It would seem quite as natural that there should be a "constructive session" of Congress or of the Senate as a "constructive recess." We think there cannot be any "constructive end" of a session or a "constructive beginning" of a session of Congress or of the Senate.

"The Constitution clearly confers upon the President the power to nominate and, by and with the advice and consent of the Senate, to appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, "and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law." Congress in the same clause is empowered by law to "vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

"Human intention cannot be made plainer by human language" than it is made clear by the Constitution that except as to the "inferior officers" referred to no Federal officer can be *appointed* save by and with the advice and consent of the Senate.

"But it was obvious that without some provision for temporary appointments to fill up vacancies which might happen while the Senate was not in session to participate in making appointments, grave inconvenience and harm to the public interest would ensue. To meet this difficulty it was by common consent provided that—

The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

"This is essentially a proviso to the provision relative to appointments by and with the advice and consent of the Senate. It was carefully devised so as to accomplish the purpose in view, without in the slightest degree changing the policy of the Constitution, that such appointments are only to be made with the participation of the Senate. Its sole purpose was to render it certain that at all times there should be, whether the Senate was

in session or not, an officer for every office, entitled to discharge the duties thereof.

"It cannot by any possibility be deemed within the intent of the Constitution that when the Senate is in position to receive a nomination by the President, and therefore to exercise its function of advice and consent, the President can issue, without such advice and consent, commissions which will be lawful warrant for the assumption of the duties of a federal office.

"The framers of the Constitution were providing against a real danger to the public interest, not an imaginary one. They had in mind a *period of time* during which it would be *harmful* if an office were not filled; not a constructive, inferred or imputed recess, as opposed to an actual one.

"They gave power to issue these commissions only where a vacancy happened during a recess of the Senate, and they specifically provided that the commission should expire at the end of the next session of the Senate.

"The commissions granted during the recess prior to the convening of Congress in extraordinary session on November 9, 1903, of course furnished lawful warrant for the assumption by the persons named therein of the duties of the office to which they were commissioned. Their names were regularly sent to the Senate thereafter. If confirmed, of course they would hold under appointment initiated by the nomination without any regard to the recess commission. If not confirmed, their right to hold under the recess commission absolutely ended at 12 o'clock meridian on the 7th of December, 1903, for at that hour the extraordinary session ended and the regular session of Congress began by operation of law. An extraordinary session and a regular session cannot coexist, and the beginning of the regular session at 12 o'clock was the end of the extraordinary session; not a constructive end of it, but an actual end of it. At 12 o'clock, December 7, the President *pro tempore* of the Senate said:

"Senators, the hour provided by law for the meeting of the first regular session of the Fifty-eighth Congress having arrived, I declare the extraordinary session adjourned without day.

"Aside from the statement upon the record that the 'hour had struck' which marked the ending of the one

and the beginning of the other, the declaration of the President *pro tempore* was without efficacy. It did not operate to adjourn without day either the Congress or the Senate. Under the law the arrival of the hour did both."⁹

Where a commission is issued by the President during the recess of the Senate the appointee holds until the end of the succeeding session of Congress, notwithstanding the Senate may have rejected the nomination. But the acceptance of a new commission by the appointee would vacate the former one.¹⁰

Mutual relations of President and Senate as to recess appointments.—The Constitution confers upon the President the right to fill vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session. That is to say, an officer appointed by the President immediately after the recess of the Senate will hold until the Senate meets and then through the entire session of that body. The object of the Constitution in providing that the commission of such an appointee should not expire before the end of the session following his appointment was to give the Senate time to deliberate upon the appointment before confirming or rejecting it. Suppose the Senate

⁹ Senate Report, No. 4389, 58 Cong., 3 Sess.

¹⁰ 2 Op. A. G., 336-339; In re Marshalship, 20 Fed. Rep., 379-382.

Mr. Madison has made the following comment upon this provision: "If the text of the Constitution be taken literally, no municipal officer could be appointed by the President alone to a vacancy not *originating* in the recess of the Senate. It appears, however, that under the sanction of the maxim, '*qui haeret in litera haeret in cortice*,' and of the '*argumentum ab inconvenienti*,' the power has been understood to extend, in cases of necessity or urgency, to vacancies happening to exist in the recess of the Senate, though not coming into existence in the recess. In the case, for example, of an appointment to a vacancy by the President and Senate of a person dead at the time, but not known to be so till after the adjournment and dispersion of the Senate, it has been deemed within the reason of the constitutional provision that the vacancy should be filled by the President alone, the object of the provision being to prevent a failure in the execution of the laws, which without such a scope to the power must very inconveniently happen, more especially in so extensive a country. Other cases of like urgency may occur, such as an appointment by the President and Senate rendered abortive by a refusal to accept it." Madison's Writings, Vol. 4, 351.

declines to confirm such an appointee, what is the effect of this action? Can the President again appoint the same person to hold through another recess of the Senate, and through another term of the Senate—for it is hardly presumable that the Senate having refused to confirm during an entire session would confirm at a succeeding session? If the President can do this once and keep an appointee in office by that method he can do it all the time, and thus keep an appointee in office to whom the Senate has refused to give its confirmation. This strikes at once at the mutual relations which exist under the Constitution between the President and the Senate in reference to appointments and wholly ignores the Constitutional rights of the Senate in the matter. The President is all powerful in the matter of appointing to office, but once he has made the appointment his power ceases, and the power of the Senate begins, either for the purpose of confirming or of rejecting the appointee. The Constitution contemplates the *joint* action of the President and the Senate in matters of presidential appointments, otherwise the necessity of confirmation by the Senate would never occur. The President by reappointing the rejected appointee practically strikes against the provision of the Constitution which requires confirmation by the Senate.

It has been customary, especially of late years, for the President to reappoint a person whom he has appointed during the recess of the Senate and who had not been confirmed by that body, but the constitutionality of such a course is exceedingly questionable for reasons already stated, and upon this subject so eminent a constitutional authority as the late Mr. Justice Miller has made the following observation:

“I think it clear, while the right of removal remains in the President, he can put no one in the place thus made vacant for a longer period than the end of the next succeeding session of the Senate; and that, whether by failure to nominate some person to fill the place during that session of the Senate, or by the refusal of the Senate to give its assent to such nomination, the office is, at the end of that session, vacant; and that an effort of the President to keep in office the man of his choice by reappoint-

ment under such circumstances is, at least in spirit, a violation of the Constitution. The functions of the President and of the Senate in relation to appointments to office are so clearly stated in the Constitution that it would not seem to be necessary that any question should arise about it. The initiative is with the President, the right to nominate and refer that nomination to the Senate is with him, and the Senate can have no right to dictate to him whom he shall nominate. Their right is one of approval or disapproval. When they have exercised that right, the President has as little authority to make other efforts to impose the same nominee upon the Senate, or to continue him in office, as that body would have to interfere with the President's choice among all eligible persons to such office. Hence any attempt, by giving the commission to the same person who had been rejected by the Senate, after the expiration of its session, or to renominate the same person to the Senate after its rejection during the same session, is equally opposed to the spirit, if not to the letter of the Constitution, and to the just right of either the President or the Senate to exercise the functions and powers which the Constitution confers upon either of them."¹¹

There must be an actual vacancy. The judgment of the President that there is one will not do.—The Constitution of Kentucky confers upon the Governor of that State the same power that the Federal Constitution confers upon the President by this provision—the language of the Kentucky Constitution being a copy of the Federal Constitution on this subject. The Supreme Court of Kentucky in construing the provision of that constitution in *Page v. Hardin*,¹² held that this clause gave no power to make a vacancy by declaration or judgment that one exists, or by granting a commission to fill one assumed to exist; that there must be a vacancy before the power or duty to fill it arises and that the determination of that question, and therefore the validity of the Governor's act, depends upon the fact of an actual vacancy and not upon his opinion or judgment of the fact. To say that his opinion or judgment of the existence of a vacancy shall

¹¹ Miller on the Constitution, 161–162.

¹² 8th B. Monroe, 669.

be the sole and conclusive test of the fact is to make him the sole and conclusive judge of all the acts and causes which may produce a vacancy and is to change a contingent into an absolute power. Such a power which would place within the uncontrolled discretion of the Governor not merely the selection of the person to fill an office actually vacant, but the displacing of an officer under the form of filling the vacancy is not conferred by the clause in question.

If the Governor may determine conclusively upon the existence of a vacancy, there is no security for this right, but by imputing to him an infallibility which belongs to no earthly officer or tribunal—which the Constitution imputes to none, and which cannot be regarded as the appointed guaranty of constitutional or legal rights.

He shall, from time to time, give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

A provision similar to the first clause of this section was in the Constitution of New York for 1777.

The plan of Mr. Pinckney provided that "the President shall, from time to time, give information to the Legislature, of the state of the Union, and recommend to their consideration the measures he may think necessary. He shall take care that the laws of the United States be duly executed. He shall commission all the officers of the United States; and, except as to ambassadors, other ministers and judges of the Supreme Court, he shall nominate and with the consent of the Senate appoint all other officers of the United States. He shall receive public ministers from foreign nations."¹⁸ The

¹⁸ Journal, 69.

Committee of Detail changed this language to read as follows:

"The President shall, from time to time, give information to the Legislature of the state of the Union. He may recommend to their consideration such measures as he shall judge necessary and expedient. He may convene them on extraordinary occasions. In case of disagreement between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper. He shall take care that the laws of the United States be duly and faithfully executed. He shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive ambassadors, and may correspond with the supreme executives of the several States."¹⁴

In the Convention this language was slightly changed before going to the Committee on Style, which reported it in its present form.

Mr. McHenry moved to omit "He may convene them on extraordinary occasions," and insert "He may convene both or either of the Houses, on extraordinary occasions."

Mr. Wilson opposed the motion, but it carried.¹⁵

This section imposes certain duties upon the President, which he is under obligation to discharge in his capacity as President for most, if not all of them, can be executed only by the President. Some of the state constitutions, notably that of New York, imposed similar duties upon their Governors.

He shall from time to time, give to the Congress information of the state of the Union.

This means that the President shall make such communications to Congress concerning the condition of the country, and shall submit such matters to that body as to him may seem proper for Congress to be advised about. It is claimed that under this provision either House of Congress may call upon the President from time to time for information and that he must respond by furnishing

¹⁴ Journal, 457.

¹⁵ Journal, 690, 691.

the information if he has it. Under this clause the respective Houses of Congress have claimed the right to call upon the President for any papers or information which he might have in relation to matters pending before them.

The House of Representatives first demanded information of the President within a few days after the organization of the Government, by passing a resolution that a "committee be appointed to inquire into the causes of failure of the late expedition under Major General St. Clair, and that the said committee be empowered to call for such persons, papers and records as may be necessary to assist their inquiries." This resolution passed by a vote of 44 to 10.¹⁶

Information of the state of the Union.—By the Union is not meant the country which comprised the United States at the time the Constitution was adopted, but rather the country as long as the United States shall continue to be a Union. Neither is such information limited to the States which constitute the Union, but includes all territory within the jurisdiction of the United States.¹⁷

It was customary during the administrations of Presidents Washington and Adams, for the President to deliver an address to both branches of Congress in the Senate chamber at the beginning of each session of Congress, in which he gave to Congress information concerning the state of the Union and recommended to its consideration those matters which in his opinion should receive congressional attention. The President was not confined by any section of the Constitution to give information to Congress, or to recommend matters for its consideration at stated occasions, but as the Constitution provides he should give such information from time to time—whenver a matter came up which in his opinion was of sufficient importance to be communicated to Congress—it was made his duty under this section to do so.

When Mr. Jefferson became President he did not follow the example of his predecessors, but sent a written

¹⁶ Annals 2nd Congress, 493.

Mr. Jefferson's account of this episode will be found in note 35 to chapter XXXVII.

¹⁷ Paschal on Constitution, 429.

message to the Senate and House of Representatives and this has been followed by all the Presidents since, and is the origin of the custom of the President sending a written message to Congress at the beginning of each session thereof.¹⁸

He may on extraordinary occasions, convene both Houses, etc.—The Constitution of Massachusetts¹⁹ conferred a like power upon the Governor, as did the Constitution of New York for the year 1777.²⁰ Under this clause the President has the power to call Congress in session on extraordinary occasions, or he may call either branch of Congress in session on such occasions. The power given to the President to call Congress together has been exercised a number of times, and the Senate alone has, from time to time, been called together in extraordinary session. This is usual upon the inauguration of a new

¹⁸ The following letter of Mr. Jefferson is explanatory on that subject:

“December 8, 1801.

“Sir:—The circumstances under which we find ourselves at this place, rendering inconvenient the mode heretofore practiced of making by personal address the first communication between the legislative and executive branches, I have adopted that by message, as used on all subsequent occasions, through the session. In doing this, I have had principal regard to the convenience of the Legislature, to the economy of their time, to their relief from the embarrassment of immediate answers on subjects not yet fully before them, and to the benefits thence resulting to the public affairs.

“Trusting that a procedure founded in these motives will meet their approbation, I beg leave through you to communicate the enclosed message, with the documents accompanying it, to the honorable House of Representatives, and pray you to accept for yourself and them the homage of my high respect and consideration.

“Thomas Jefferson.

“The Honorable the Speaker of the House of Representatives.”

North American Review, 1830, 463, 464.

It is well understood that Mr. Jefferson with all his attainments and scholarship was not happy in expressing his views orally, and it was for that reason that he did not follow the example of his predecessors, but resorted to a written message. The precedent which Mr. Jefferson established was certainly a happy one and has proven popular with the people. It is the origin of the custom of the Presidents sending written messages to Congress at their opening sessions.

¹⁹ 3 Elliot, 368.

²⁰ Poore's Charters, vol. 2, 1335.

President, in order that the appointments may be confirmed.

There is no recorded instance of the President having called the House of Representatives together alone.

The term "extraordinary occasions," would imply that the framers of the Constitution thought that some urgent necessity might arise when it would be necessary for Congress or either branch thereof to be called together and they accordingly conferred upon the President the power to do so at such times. What is an extraordinary occasion is for the President to determine. A State Constitution by a similar provision authorized the governor to call the legislature together and it was held that though the governor might err in doing so, there was no power to prevent him or to correct the error.²¹ Another State Constitution contained the exact language on this subject which is found in the Constitution of the United States, that is, it authorized the governor to call the legislature or either branch thereof together on "extraordinary occasion." The governor having exercised his authority and called the legislature together, it was claimed by a very large part of the people of the State that no "extraordinary occasion" existed, and that in consequence the call was invalid and the proposed legislation unnecessary. The court said the fact that a large majority of the people of the State might not consider that an "extraordinary occasion" existed, or that they believed the legislation which it was proposed should be enacted was unnecessary, vicious or injurious to the interests of the State, would not justify a court in declaring the governor had violated his constitutional prerogative in calling the legislature together, and that before a court would be justified in nullifying such an act of the governor it should appear that the act was a clear, palpable and unquestionable violation of the constitutional grant of power conferred upon him, if indeed a court had such power at all.²²

Mr. Justice Miller said of this clause, "The power of the President to convene both Houses, or either of them, on extraordinary occasions, has been rarely exercised, and certainly has not been abused during the history of the

²¹ *Whitman v. R. R. Co.*, 2 Har., 515, 525.

²² *Farrelly v. Cole*, 60 Kansas, 356, 366.

Government. The principal exercise of this power has been in proclamations by which the President has called the Senate together at the close of a session of Congress, for the purpose of considering appointments to office, and sometimes treaties.²³

If, after the President has called Congress to meet on an extraordinary occasion the occasion for the call should no longer exist, he may revoke his call and any meeting of Congress under it would be without authority and any action which it might take would be void.²⁴

The President has never had occasion to exercise the power conferred upon him by this section, of adjourning Congress to such time as he should think proper, because the two Houses disagreed in regard to the time of adjournment.

He shall receive ambassadors and other public ministers.

The President's receiving ambassadors and ministers is a diplomatic function. The ambassadors and ministers whom the United States sends abroad as its representatives are received by the heads of those countries, and in turn, the President of the United States receives ambassadors and ministers which foreign countries send to the United States. The Constitution by this section imposes the duty upon the President to do this. The President may decline to receive an ambassador or public minister who is not agreeable to him, and may dismiss such representative at his pleasure.

Shall take care that the laws be faithfully executed.

This is the most important duty which this section confers upon the President, and it can be traced to a very early origin.

In the charter granted to Massachusetts Bay, in 1629 it was provided that "all Orders, Lawes, Statuts and Ordinance, Instrucons and Direcons, as shalbe soe made by the Governor, or Deputie Governor of the said Com-

²³ Miller on Constitution, 170.

²⁴ Tannant's Case, 3 Neb., 409.

pany, and such of the Assistants and Freemen as afore-said, and published in writing, under their comon Seale, shalbe carefullie and dulle observed, kept, performed, and putt in Execucon, according to the true intent and meaning of the same." But the charter did not provide who was to execute these laws.

Five years later the Maryland charter granted to Lord Baltimore corrected the error in the Massachusetts charter and "enjoined upon his Lordship, the laws duly to execute, upon all the people within the said province by imposition of penalties, imprisonment or any other punishment; yea, if it shall be needful, and that the quality of the offense require it, by taking away member of life, either by him, the said now Lord Baltimore and his heirs, or by his or their deputies, lieutenants, judges, magistrates, officers and ministers, to be obtained or appointed according to the tenor and true intention of these presents."

Many of the charters after that contained like clauses. In the plan of the constitution which Franklin submitted to the Congress of 1754 was the provision, "that it be the President's office and duty to cause the laws to be carried into execution."

The Constitution of Pennsylvania for 1776 provided that "the President with the council, is to take care that the laws shall be faithfully executed." The constitutions of New York and Vermont contained similar provisions.

With such charter and constitutional precedents before it, the Convention had little trouble in determining to insert the above clause in the Constitution.

A distinguished commentator on the Constitution says of this language: "When a law has been passed through the forms of legislation, either with or without the President's assent, it is his duty to see that the law is faithfully executed so long as nothing is required from him but ministerial action. But he is not to erect himself into a judicial court and decide that the law is unconstitutional, and that therefore he will not execute it; for if that were done manifestly there never could be a judicial decision."²⁵

The words "take care" imply that an obligation or duty

²⁵ Paschal on the Constitution, 420.

is imposed upon the President to see that the laws are executed.

Senator Howard in the trial of President Johnson said that the words "he shall take care" meant that the President should be diligent, attentive and faithful in the appointment of proper officers and in seeing that they faithfully discharge their duty.²⁶

The laws referred to in this section are the laws of the United States, and the laws of a State or territory are only included in the contingency that an insurrection arises according to the Constitution and laws of Congress.²⁷

The duty of seeing that the laws are faithfully executed is not limited to the enforcement of Acts of Congress, or of the treaties of the United States according to their *express terms*, but includes the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution and extends to the protection of the federal judiciary. To do this the President has the power to take such measures as he thinks proper for the protection of a judge of a court of the United States while in the discharge of his office, who is threatened with personal assault which might prove fatal. So he can protect the mail and those guarding it, and place guards upon the property of the government to protect it.²⁸

Under this language, it is the duty of the President to see that the other executive and administrative officers of the government faithfully perform their duties, which are prescribed by the statutes, but he has no power to add or subtract from the duties imposed upon subordinate executive and administrative officers by the law.²⁹

In order to aid him in the performance of his duty to see that the laws are faithfully executed, the President has the right to appoint assistants and agents to make investigations and report to him.³⁰ It is the duty of

²⁶ Johnson's Impeachment Trial, vol. 3, 35.

²⁷ 8 Op. A. G., 11.

²⁸ In re Nagle, 135 U. S., 64, 65-67.

²⁹ 19 Op. A. G., 686-687.

³⁰ 4 Op. A. G., 248.

the President under this clause to come to the aid of the judicial authority in order that the law as expounded by a co-ordinate branch of the government may be carried out and enforced, in case the enforcement of the orders, or construction of the court is resisted by a force too strong for its ministerial officers to overcome.³¹ The President can not under this clause prevent or forbid the execution of the laws.³²

The President may order the dismissal of a suit brought in the name of the United States when such an order would be proper, but this would be the exercise of an unusual power and should be resorted to with great care and discretion.^{32a} The same power and duty, says a recent writer, would enable him to protect the public and private rights and enforce the execution of the laws of the United States.^{32b}

Shall commission all the Officers of the United States.— This is the last power conferred on the President by this clause. The act of appointing to office and commissioning the person appointed can not be considered as one and the same thing. The last act necessary to complete the commission is the signature of the President, and the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.³³ The President may withhold a commission from the appointee even after the appointment has been confirmed by the Senate.³⁴

There is nothing in the Constitution which prevents the President from transacting public business away from the seat of government, and all the Presidents have done so.

On April 3, 1876, The House of Representatives passed the following resolution, "Resolved, that the President of the United States be requested to inform this House, if, in his opinion, it is not incompatible with the public interest, whether since the 4th day of March, 1869, any executive offices, acts, or duties, and, if any, what, have been performed at a distance from the seat of Government

³¹ 17 Fed. Cases, 9487, 149.

³² 12 Wheaton, 612.

^{32a} 2 Op. A. G., 53, 54.

^{32b} Findley's American Executive, 124.

³³ Marbury v. Madison, 1 Cranch, 137, 157, 158.

³⁴ 4 Op. A. G., 218.

established by law, and for how long a period at any one time, and in what part of the United States; also, whether any public necessity existed for such performance, and, if so, of what character, and how far the performance of such executive offices, acts, or duties at such distances from the seat of Government by law was in compliance with the act of Congress of the 16th day of July, 1790."^{24a}

The President replied as follows:

"Washington, May 4, 1876.

"To the House of Representatives:

"I have given very attentive consideration to a resolution of the House of Representatives passed on the 3rd of April, requesting the President of the United States to inform the House whether any executive offices, acts, or duties, and, if any, what, have within a specified period been performed at a distance from the seat of Government established by law, etc.

"I have never hesitated and shall not hesitate to communicate to Congress, and to either branch thereof, all the information which the Constitution makes it the duty of the President to give, or which my judgment may suggest to me or a request from either House may indicate to me will be useful in the discharge of the appropriate duties confided to them. I fail, however, to find in the Constitution of the United States the authority given to the House of Representatives (one branch of the Congress, in which is vested the legislative power of the Government) to require of the Executive, an independent branch of the Government, coordinate with the Senate and House of Representatives, an account of his discharge of his appropriate and purely executive offices, acts, and duties either as to when, where, or how performed.

"What the House of Representatives may require as a right in its demand upon the Executive for information is limited to what is necessary for the proper discharge of its powers of legislation or of impeachment.

"The inquiry in the resolution of the House as to where executive acts have within the last seven years been performed and at what distance from any particular spot or

^{24a} Cong. Record, Vol. 4, pt. 3, 2158.

for how long a period at any one time, etc., does not necessarily belong to the province of legislation. It does not profess to be asked for that object.

"If this information be sought through an inquiry of the President as to his executive acts in view or in aid of the power of impeachment vested in the House, it is asked in derogation of an inherent natural right, recognized in this country by a constitutional guaranty which protects every citizen, the President as well as the humblest in the land, from being made a witness against himself.

"During the time that I have had the honor to occupy the position of the President of this Government it has been, and while I continue to occupy that position it will continue to be, my earnest endeavor to recognize and to respect the several trusts and duties and powers of the co-ordinate branches of the Government, not encroaching upon them nor allowing encroachments upon the proper powers of the office which the people of the United States have confided to me, but aiming to preserve in their proper relations the several powers and functions of each of the coordinate branches of the Government, agreeably to the Constitution and in accordance with the solemn oath which I have taken to 'preserve, protect, and defend' that instrument.

"In maintenance of the rights secured by the Constitution to the executive branch of the Government I am compelled to decline any specific or detailed answer to the request of the House for information as to 'any executive offices, acts, or duties, and, if any, what, have been performed at a distance from the seat of Government established by law, and for how long a period at any one time and in what part of the United States.'

"If, however, the House of Representatives desires to know whether during the period of upward of seven years during which I have held the office of President of the United States I have been absent from the seat of Government, and whether during that period I have performed or have neglected to perform the duties of my office, I freely inform the House that from the time of my entrance upon my office, I have been in the habit as were all of my predecessors (with the exception of one who lived only one month after assuming the duties of his office,

and one whose continued presence in Washington was necessary from the existence at the time of a powerful rebellion), of absenting myself at times from the seat of Government, and that during such absences I did not neglect or forgo the obligations or the duties of my office, but continued to the discharge all of the executive offices, acts, and duties which were required of me as the President of the United States. I am not aware that a failure occurred in any one instance of my exercising the functions and powers of my office in every case requiring their discharge, or of my exercising all necessary executive acts, in whatever part of the United States I may at the time have been. Fortunately, the rapidity of travel and mail communication and the facility of almost instantaneous correspondence with the offices at the seat of Government, which the telegraph affords to the President in whatever section of the Union he may be, enable him in these days to maintain as constant and almost as quick intercourse with the Departments at Washington as may be maintained while he remains at the capitol.

"The necessity of the performance of the executive acts by the President of the United States exists and is devolved upon him wherever he may be within the United States, during his term of office by the Constitution of the United States.

"His civil powers are no more limited or capable of limitation as to the place where they shall be exercised than are those which he might be required to discharge in his capacity of commander-in-chief of the Army and Navy, which latter powers it is evident he might be called upon to exercise, possibly, even without the limits of the United States. Had the efforts of those recently in rebellion against the Government been successful in driving a late President of the United States from Washington, it is manifest that he must have discharged his functions, both civil and military elsewhere than in the place named by law as the seat of the Government.

"No act of Congress can limit, suspend, or confine this constitutional duty. I am not aware of the existence of any act of Congress which assumes thus to limit or restrict the exercise of the functions of the Executive. Were there such acts, I should nevertheless recognize the sup-

erior authority of the Constitution and should exercise the powers required thereby of the President.

"The act to which reference is made in the resolution of the House relates to the establishing of the seat of Government and the providing of suitable buildings and removal thereto of the offices attached to the Government, etc. It was not understood at its date and by General Washington to confine the President in the discharge of his duties and powers to actual presence at the seat of Government. On the 30th of March 1791, shortly after the passage of the act referred to, General Washington issued an Executive proclamation having reference to the subject of this very act from Georgetown, a place remote from Philadelphia, which then was the seat of Government, where the act referred to directed that 'all offices attached to the seat of Government' should for the time remain.

"That none of his successors have entertained the idea that their executive offices could be performed only at the seat of Government is evidenced by the hundreds upon hundreds of such acts performed by my predecessors in unbroken line from Washington to Lincoln, a memorandum of the general nature and character of some of which acts is submitted herewith; and no question has ever been raised as to the validity of those acts or as to the right and propriety of the Executive to exercise the powers of his office in any part of the United States.³⁵

"U. S. Grant."

³⁵ Messages of the Presidents, vol. 7, 361-364.

The following is an abstract of the exhibit or memorandum referred to in President Grant's reply to Congress:

President Washington was absent from the Capitol during his two terms at least one hundred and eighty-one days and transacted important official business during that time.

President John Adams was absent during his term of four years three hundred and eighty-five days, and during such time he performed many important public acts.

President Jefferson during his two terms was absent from the seat of Government seven hundred and ninety-six days, more than one-fourth the whole period of his presidency, and during that time performed many public acts from Monticello.

Madison, during his two terms was absent six hundred and thirty-seven days and also performed many official acts from his home at Montpelier.

Monroe was absent during his two terms seven hundred and eight days and during that time attended to official duties wherever he happened to be, whether on his farm, or at his summer home on the Chesapeake, or while traveling.

President John Quincy Adams was absent during his term of four years two hundred and twenty-two days and performed much important official business during that time.

President Jackson during his service of eight years was absent five hundred and two days and during his absence signed and issued many public papers, commissions, pardons and proclamations.

President Van Buren was absent from the Capitol during his term one hundred and thirty-one days and performed many official acts during his absence, among them the signing of a commission for a United States Judge.

President Tyler was absent during his Presidential term one hundred and sixty-three days and during such time signed many public papers and documents of great importance.

President Polk was absent during his term thirty-seven days, but appears to have signed only two official papers during that time.

President Taylor during his term was absent thirty-one days and during that time signed two commissions and other important papers.

President Fillmore was absent sixty days and during his absence he signed many pardons, commissions, etc.

President Buchanan was absent during his term fifty-seven days and signed important papers during that time. Messages of the Presidents, vol. 7, 361, 364.

CHAPTER XXXIX.

THE EXECUTIVE CONTINUED.

Is the President subject to legal process?—A question of much importance grows out of the relations of the executive to the government. How far, if at all, is the President subject to the process of the Courts in civil or criminal actions. Upon this question there has been great diversity of opinion among lawyers and constitutional writers for more than a century.

The chief authority in favor of the view that the President is subject to the process of a court is the decision of Chief Justice Marshall, upon application for a subpoena *duces tecum* directed to President Jefferson in the trial of Aaron Burr. In that case the Chief Justice issued an order for a subpoena *duces tecum* against President Jefferson requiring him to appear and produce at the trial certain papers, which, it was believed, were in his possession. Chief Justice Marshall said upon that trial:

“That the President of the United States may be subpoenaed and examined as a witness and required to produce any paper in his possession, is not controverted. The President, although subject to the general rules which apply to others, may have sufficient motives for declining to produce a particular paper, and those motives may be such as to restrain the court from enforcing its production. The guard furnished to this high officer to protect him from being harassed by vexatious and unnecessary subpoenas is to be looked for in the conduct of the court after these subpoenas have been issued, not in any circumstances which is to precede their being issued. . . . The Court can perceive no objection to a subpoena *duces tecum* to any person whatever provided the case be such as to justify the process.”¹ The Chief

¹ Burr's Trial, Vol. 1, 182.

Marshall's action in this regard has been the subject of various opinions among distinguished members of the American bench

Justice also said: "In no case of this kind would a court be required to proceed against the President as an or-

and bar. It was reviewed and commented upon in several of the addresses delivered throughout the United States on the occasion of Marshall Day in 1901, the hundredth anniversary of his installation as Chief Justice of the United States. Some of these views sustain Marshall, while others think his decision erroneous.

Professor Thayer in his address on that occasion said:—"It was a strange conception of the relations of the different departments of the government to each other to imagine that an order with a penalty was a legitimate judicial mode of addressing the Chief Justice."—Dillon's Marshall, vol. 1, 233.

Mr. Charles E. Perkins: "It was a difficult position, for as the court was a United States court, only the authorities of the United States could be called upon to enforce its order and they were completely in Jefferson's hands, but Marshall was equal to the occasion. He declared it to be his duty to issue the subpoena without regard to consequences, and so firm was he that Jefferson at last yielded and sent the letter to the Attorney General to be produced if necessary."—Dillon's Marshall, vol. 1, 327.

Mr. David J. Pancoast: "The propriety and legality of the Chief Justice's ruling on this point has not been universally accepted."—Dillon's Marshall, vol. 1, 434.

Senator Henry Cabot Lodge: "That Marshall's ruling as to treason was correct, and that he laid down the American law and definition of treason in a manner which subsequent generations have accepted can not be questioned. But this can not be said of the famous rule by which he granted the motion to issue a subpoena *duces tecum* directed to the President of the United States. If his desire was to fill Jefferson with impotent anger and with a sense of affront and humiliation, he succeeded amply. In any other view the granting of the motion was a failure and a mistake, for instead of exhibiting the power of the court it showed its limitation. The Chief Executive of the Nation clearly can not be brought to court against his will, for higher duties are imposed upon him, and still more decisive is the practical consideration that the court is physically powerless to enforce its decrees against the Chief Magistrate, by whom alone, in the last resort, the decrees of the court can be carried into execution."—Dillon's Marshall, vol. 2, 328.

Mr. U. M. Rose: "I have lately seen an address by a distinguished speaker laudatory of Marshall, treating his decision, however, as clearly erroneous. In this conclusion I am unable to agree. The court only awarded the writ for production of the paper and did not decide that it would require the personal attendance of the President. The letter did not purport to be a public document. The way was left open for any objections or reservations that the President might make. No one in this country is above the law; and it is an alarming doctrine that if a private paper happens to get into the custody of the President the person accused of crime may be hanged because it is inaccessible to him and the courts."—Dillon's Marshall, vol. 3, 133.

dinary individual. The objections to such a course are so strong and so obvious that all must acknowledge them.²

Judge Dillon reached the conclusion that: "The President, by virtue of his office, is in *criminal cases*, totally exempt from judicial process requiring his attendance as a witness. In the absence of controlling legislation, a court in such cases has the power, agreeably to the rules and usages of law, to issue to him a subpoena generally to appear as a witness, or a subpoena *duces tecum* to produce a material and relevant document in his possession."³

Jefferson took a wholly different view of the case from Marshall as may be seen from the following letter:

"Washington, June 20, 1807.

"Dear Sir: I did not see till last night the opinion of the Judge on the *subpoena duces tecum* against the President. Considering the question there as *coram non judice*, I did not read his argument with much attention. Yet I saw readily enough that, as is usual where an opinion is to be supported, right or wrong, he dwells much on smaller objections, and passes over those which are solid. Laying down the position generally, that all persons owe obedience to subpoenas, he admits no exception unless it can be produced in his law books. But if the Constitution enjoins on a particular officer to be always engaged in a particular set of duties imposed on him, does not this supersede the general law, subjecting him to minor duties inconsistent with these? The Constitution enjoins his constant agency in the concerns of six millions of people. Is the law paramount to this, which calls on him on behalf of a single one?

"Let us apply the Judge's own doctrine to the case of himself and his brethren. The Sheriff of Henrico summons him from the bench, to quell a riot somewhere in this county. The federal judge is, by the general law, a part of the *posse* of the State sheriff. Would the Judge abandon major duties to perform lesser ones? Again; the court of Orleans or Maine commands, by subpoenas,

² Burr's Trial, vol. 2, 536.

³ Dillon's Life and Character of Marshall, Vol. 1, 37, Introduction.

the attendance of all the judges of the Supreme Court. Would they abandon their posts as judges, and the interests of millions committed to them, to serve the purposes of a single individual?

"The leading principle of our Constitution is the independence of the Legislature, executive and judiciary of each other, and none are more jealous of this than the judiciary. But would the executive be independent of the judiciary, if he were subject to the *commands* of the latter, and to imprisonment for disobedience; if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties? The intention of the Constitution, that each branch should be independent of the others, is further manifested by the means it has furnished to each, to protect itself from enterprises of force attempted on them by the others, and to none has it given more effectual or diversified means than to the executive.

"Again, because ministers can go into a court in London as witnesses, without interruption to their executive duties, it is inferred that they would go to a court 1000 or 1500 miles off, and that ours are to be dragged from Maine to Orleans by every criminal who will swear that their testimony 'may be of use to him.' The Judge says, '*It is apparent* that the President's duties as chief magistrate do not demand his whole time, and are not unremitting.' If he alludes to our annual retirement from the seat of government, during the sickly season, he should be told that such arrangements are made for carrying on the public business, at and between the several stations we take, that it goes on as unremittingly there as if we were at the seat of government. I pass more hours in public business at Monticello than I do here, every day; and it is much more laborious, because all must be done in writing. Our stations being known, all communications come to them regularly, as to fixed points. It would be very different were we always on the road or placed in the noisy and crowded taverns where courts are held."

That Jefferson felt deeply grieved at the course which Marshall had taken in ordering a subpoena *duces tecum*

to be served upon him and that he intended, if necessary, to resist being served with such a paper is conclusively shown by the following letter:

"I learn by the newspapers that I am to have another subpoena *duces tecum* for Eaton's declaration. With respect to my personal attendance higher duties keep me here. During the present and ensuing months I am here to avoid the diseases of tidewater situations and all communications on the business of my office, by arrangements which have been taken, will be daily received and transacted here. With respect to the paper in question it was delivered to the Attorney-General with all the other papers relating to Burr. I have therefore neither that nor any of the others in my possession. Possibly the Attorney-General may have delivered it to you. If not, he has it, and he is the person to whom a subpoena to bring that or any others into court may be at once addressed.

"That Burr and his counsel should wish to convert his trial into a contest between the judiciary and Exve. authorities was to be expected. But that the Chief Justice should lend himself to it, and take the first step to bring it on, was not expected. Nor can it be now believed that his prudence or good sense will permit him to press it. But should he, contrary to expectation, proceed to issue any process which should involve any act of force to be committed on the persons of the Exve. or heads of departments, I must desire you to give me instant notice, and by express if you find that can be quicker done than by post; and that moreover you will advise the marshal on his conduct, as he will be critically placed between us. His safest way will be to take no part in the exercise of any act of force ordered in this case. The powers given to the Exve. by the Constitution are sufficient to protect the other branches from judiciary usurpation of pre-eminence, and every individual also from judiciary vengeance, and the marshal may be assured of its effective exercise to cover him. I hope however that the discretion of the C. J. will suffer this question to lie over for the present, and at the ensuing session of the legislature he may have means provided for giving to individuals the benefit of the testimony of the Exve. func-

tionaries in proper case, without breaking up the government. Will not the associate judge assume to divide his court and procure a truce at least in so critical a conjuncture?"⁴

When President Jefferson received the subpoena he paid no attention to it. Attorney-General Stanbery in his argument in *Mississippi v. Johnson*,⁵ said: "He did not even make any return to the court, nor any excuse to the court. He simply wrote a letter to the district attorney, in which he stated that he could not conceive how it was that, under such circumstances, the court should order him to go there by subpoena; that he *would not go*; that he did not propose to go; but he said to the district attorney that there was no difficulty in obtaining the paper in the proper way. But he would pay no respect to the subpoena. Thereupon Colonel Burr himself moved for compulsory process to compel the President to come. Of course that was legitimate. If the court, in saying that the President was amenable to subpoena, was right, the court was bound, at the instance of the defendant, to follow it up by process of attachment to compel obedience to its lawful order.⁶ At that point, however, the court hesitated, and not a step further was taken toward enforcing the doctrine laid down by the Chief Justice. It then became quite apparent that a very great error had been committed. I say a very great error, with the greatest submission to the great Chief Justice, who on circuit at *nisi prius*, suddenly on a motion of this kind, had held that the President of the United States was liable to the subpoena of any court as President."

Consequences of the gravest import might have resulted had Marshall sustained Burr's motion for compulsory

⁴ Ford's Jefferson, Vol. 9, 59, 60, 61, 62.

⁵ 4 Wallace 483.

⁶ Judge Dillon says: "Mr. Stanbery is mistaken in his statement that the counsel for the United States did not admit that such process could be issued against the President. He is also mistaken in saying that Colonel Burr himself moved for compulsory process to compel the President to come. He is also mistaken in stating that the Court hesitated to follow up the subpoena by process of attachment and that not a step further was taken towards enforcing the doctrines laid down by the Chief Justice."—Dillon's Marshall, Vol. 1, 50, Introduction, Note.

process against Jefferson, for the President was determined, as we have already seen, that he would not submit to such process, and he would certainly have defended himself with force against the marshal, and a tragical chapter in American history might have been enacted.

The question was considered by the circuit court of the District of Columbia and the following opinion delivered by Mr. Justice Cranch: "Suppose the laws require a specific act of the President himself, involving private rights, which he refuses to perform. The courts have as much law for issuing a *mandamus* against him as against any of his subordinates in a like case. It is a 'case' as much as that of which the court has already assumed jurisdiction. The President disobeys their *mandamus* and they send a judgment. By whom do they send it? By a marshal holding his office at the will of the President, who can strike their processes dead in his hands, by dismissing him on the spot. This fact proves the absurdity of the power assumed and that which the President can legally do to protect himself he can do to protect any of his agents, being always responsible to his country for the proper exercise of his power.

"But suppose the court succeeded in arresting the President, and put him in the county jail. Where then is the supreme executive power of this great Republic? Transferred from the President's house to the city hall; from the Chief Magistrate, elected by the people of the whole United States, to three judges for the District of Columbia.

"The arrest and imprisonment of any executive officer, as such, involves the same principles and would lead to the same consequences in a greater or less degree, according to the importance of the station held by him. It is still an attempt to control the executive power; not by confining its head, but by tying up its hands; or rather by forcing the hands to work, not according to the will of their constitutional head, but in obedience to the will of another department of the government.

"It is said that if the Court had not this power, 'an individual who may have been ruined by the refusal of an officer to perform a ministerial act, positively enjoined

upon him by law, will be entirely without redress.' If it were even so, would it justify the court in assuming executive authority in violation of the Constitution? It would but prove a defect in our institutions, which it would be incumbent on the people to repair. But it is not so. The idea that courts are the only places where wrongs of all sorts are to be redressed, and judges the only dispensers of right is an error. Where the inferior executive officer, or even the President himself, refuses to perform his executive duties, there is an obvious mode of redress, without the interposition of the judicial authority. If a subordinate executive officer 'refuse to perform a ministerial act positively enjoined upon him by law,' the injured citizen may appeal to the President, whose duty it is to 'take care that the laws be faithfully executed,' and who has power to turn out a perverse subordinate. If the case be so very plain, the President will at once enforce the execution of the law and the citizen will have effectual redress, though 'this Court has not jurisdiction.' If the case be not so very plain, the matter may be referred back to Congress, to make it plain by further legislation; and thus the citizen would have complete redress, without the aid of the court. There is a process by which the President himself may be reached, for a perverse refusal to execute the laws or take care that they be executed, and a Chief Magistrate who will do his duty put in his place."

"The Executive power," said Justice Thompson, "is vested in the President; and as far as his powers are derived from the Constitution, he is beyond the reach of any other department, except in the mode prescribed by the Constitution through the impeaching power."⁷

In rendering his decision in the Burr case Chief Justice Marshall compared the relations of the King of England and the President of the United States, and used this language:

"By the Constitution of Great Britain the crown is hereditary and the monarch can never be a subject.

"By that of the United States, the President is elected from the mass of the people and on the expiration of the

⁷ United States v. Kendall, 5 Cranch C. C., 197, 198.

⁸ Kendall v. United States, 12 Peters, 524, 610.

time for which he is elected returns to the mass of people again. How essentially this difference of circumstances must vary the policy of the laws of the two countries in reference to the personal dignity of the executive chief will be perceived by every person. In this respect the first magistrate of the Union may more properly be likened to the first magistrate of the State, at any rate under the form of confederation, and it is not known ever to have been doubted but that the chief magistrate of the State might be served with a subpoena *ad testificandum*. If in any court of the United States it has ever been decided that a subpoena can not issue to the President that decision is unknown to this court.”

In *Mississippi v. Johnson*,¹⁰ it was sought to enjoin the President not to carry into execution an act of Congress which it was claimed was unconstitutional. Chief Justice Chase in delivering the opinion said (page 501): “We are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us, whether the occupant of the presidential office be described as President or a citizen of a State. Suppose the bill (page 500) filed and the injunction prayed for allowed. If the President refuses obedience, it is needless to observe that the court is without power to enforce its process. If, on the other hand, the President complies with the order of the court and refuses to execute the acts of Congress, is it not clear that a collision may occur between the executive and legislative departments of the government? May not the House of Representatives impeach the President for such refusal? And in that case could this Court interfere, in behalf of the President, thus endangered by compliance with this mandate and restrained by injunction in the Senate of the United States from sitting in a court of impeachment? Would the strange spectacle be offered to the public world of an attempt by this court to arrest proceedings in that court? These questions answer themselves.”

Judge Story dismisses this important subject with a few lines of consideration: “The President can not be liable

⁹ Burr's Trial, Combs, 45.

¹⁰ 4 Wallace, 475.

to arrest, imprisonment or detention while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability."¹¹

An eminent writer on constitutional law declares the President cannot be arrested or restrained of his personal liberty by anybody for anything, not even for the commission of murder. He is responsible only to the Senate by impeachment. During his impeachment trial he can not be arrested, nor in any manner restrained, nor forced to appear in person before the tribunal, nor to give testimony, nor be deprived of any of his powers as President. Such are the postulates of political science which the Constitution implies. It is impossible to make the supreme executive head of the government subject to process without ultimately destroying all power to execute process,—i. e., without disorganizing the Government. It is impossible to make the executive head of the Government of the United States subject to process without destroying the unity of the executive power, without placing a part of the power to execute the laws under the control of some other person than the President; and this the Constitution forbids, in that it vests the whole executive power upon the President of the United States should he resist it, for the Constitution makes the whole machinery of execution subject ultimately to his command. Moreover, the Constitution vests in the President the unlimited power of pardon, except for impeachment. He could, therefore, if made subject to the ordinary process of law, free himself by pardoning himself.¹² The exemption from service exists only while he is President. After his term expires he can be served civilly or prosecuted.¹³

As comparisons are sometimes made between the protection afforded by the Constitution to the President of the United States and that afforded to the King of England, it is well to see what the English courts have said on the question of serving the King with process. In Campbell's *Lives of the Lord Chancellors* it is remarked: "A

¹¹ Story on the Constitution, Vol. 2, Section 1569.

¹² Burgess, Political Science, Vol. 2, 245, 246.

¹³ Woodburn's American Republic, 136, 137.

curious constitutional question arose which very much perplexed the Lord Keeper, and remains to this day undetermined. The Earl of Bristol, in his defence, relied upon communications which had passed between him and the King, when Prince, at Madrid, and to prove these proposed to call the King himself as a witness. The Lord Keeper gave it as his opinion, that the Sovereign can not be examined in any judicial proceeding under an oath, or without an oath, as he is the fountain of justice, and since no wrong may be imputed to him the evidence would be without temporal sanction. On the other hand they pointed out the hardship of an innocent man being deprived of his defense by the heir to the Crown becoming King, and urged that substantial justice ought to be paramount to all technical rules. A proposal was made which could not be resisted, that the Judges should be consulted,—and two questions were propounded for their consideration: 1. 'Whether in case of treason or felony, the King's testimony was to be admitted or not?' 2. 'Whether words spoken to the Prince, who is after King, make any alteration in this case?' But when the Judges met on a subsequent day, the Lord Chief Justice declared that his Majesty, by his Attorney-General, had informed him that, "not being able to discern the consequence which might happen to the prejudice of his own crown from these general questions his pleasure was that they should forbear to give an answer thereto."¹⁴

This review of the subject shows that the authorities are not in harmony on the question. Chief Justice Mar-

¹⁴ The following interesting note is cited in connection with the text: "I humbly apprehend that the Sovereign, if so pleased, might be examined as a witness in any case, civil or criminal, but must be sworn, although there would be no temporal sanction to the oath (2 Rol. Ab. 686). King James I yielded testimony in many things in the Countess of Exeter's case; whether sworn does not appear (Huds. Treatise on Star Chamber, 2 Coll. Jur. 206). The simple certificate of James I as to what had passed in his hearing, was received as evidence in the Court of Chancery (*Abigny v. Clifford*, Hob. 213). But Willis, C. B., stated that in every other case the King's certificate had been refused (*Omichund v. Barker*, Willis 550). In the Berkeley peerage case before the House of Lords in 1811, there was an intention of calling George IV, then Prince Regent, as a witness, and I believe the general opinion was that he might have been examined, but not without being sworn."

shall thought the courts possessed the power to issue a subpoena *duces tecum* for the President of the United States, to compel him to produce papers which he might have in his possession. It was in the trial of a criminal case that this decision was announced. In his opinion the Chief Justice did not seem to confine his language to a criminal case and the inference is that the power resided in the court to issue such a subpoena in a civil as well as a criminal cause. Judge Dillon's opinion is that the President, by virtue of his office, is not exempt from judicial process in criminal cases. The contrary opinion is sustained by Mr. Justice Story and by Judge Cranch, and this difference of opinion among jurists is also found among prominent members of the bar, as we have already seen. Chief Justice Chase, in *Mississippi v. Johnson*, says, "that the Court is without power to enforce its process against the President should he refuse to obey the order of the court." This may be regarded as a strong intimation that the court was of the opinion that it had no power to make such an order.

The question can not be regarded as authoritatively settled. Should it ever arise it might produce consequences of the gravest character, and cause a collision between the judicial and executive branch of the government, and it is hoped that diplomacy will always avert such a collision.

The immunity of the President is because of his official position. He is a great and necessary part of our government. The legislative branch is composed of many members, while the judicial branch is a collective body and it would be difficult to injure either numerically so as to interfere with the administration of the Government. But it is wholly different with the executive branch. One man constitutes all there is of that, and upon him the Constitution has placed many great and important duties, and these duties are constant. He does not sit in authority at stated intervals like Congress and the courts. There is no recess in the discharge of his official duties. From the time he takes the oath until his office expires there is a continuity of official obligations and duties, sacredly and solemnly imposed upon him by the Constitution. Anything which im-

pairs his usefulness in the discharge of his duties, however slight, to that extent impairs the operation of the Government. If in any way he is rendered incapable of performing his duties, to that extent the Government is weakened. There is no sacred charm in the personality of the President that protects him. It is only because of his official relation to the Government. If he should be imprisoned that would prevent the discharge of many official duties which the Constitution imposes upon him. How could he receive ambassadors, and other public ministers, while in jail? How could he see that the laws were faithfully executed when the law was keeping him a prisoner in a dungeon? How could he command the army or the navy in time of war if he were locked in a cell? Subjecting him to civil process might result in his being imprisoned and therefore he is not amenable to it. The President is the only constant and continuing factor in the division of governmental power under our Constitution which is necessary to its existence. This is because the Constitution has imposed upon him many duties which he must discharge and he must be personally free—that is, there must be no restraint of his person in order that he may be able to discharge them. The President enjoys no privileges not given to every American citizen, except such as flow from his official position. It is only because the Constitution makes him a necessary part of the Government that he is protected from legal process.

The controlling principle is this: It is not the service of a summons upon the President, or the serving of a subpoena upon him to testify as a witness, but it is what might follow if the President should refuse. There must be, and there is power in the judicial branch to enforce its order. If therefore the President should refuse to obey the summons of the subpoena the court is bound to order its enforcement. The President having refused in the first instance to obey, by every rule and law of consistency is bound to resist, and there is at once precipitated a conflict. This is illustrated by the case of *Ex parte Merryman*,¹⁵ where Chief Justice Taney issued an order to an officer of the army which the officer refused

¹⁵ Taney's C. C., 246.

to obey, and being in command of a much greater force than the marshal of the court was in command of, the Chief Justice admitted that it would be useless to undertake the enforcement of the order. So with the President of the United States, for being in command of a much greater force than the marshal of the court could command, although he could call the *posse comitatus*, he would be powerless to enforce the courts order.

It will be said, as it has been said, that it would be a lamentable episode in the history of American jurisprudence if the President of the United States should happen to witness a homicide and could not be compelled to testify in court to what he saw; and that such refusal might result in an innocent man being convicted. This might occur, but it is hardly probable. It is reasonably presumable that no man elected to the high office of President of this country would refuse to testify when his testimony would probably clear an innocent man, but that is a matter that must be left to the conscience of the President. The consequences would be no worse in the case of the President refusing to testify than they are now with ambassadors and foreign ministers and consuls, and we have already seen that a foreign minister was witness to a criminal assault, but that this government was powerless to secure his testimony at the trial of the defendant. The hardship is equally as great in this case as it would be in the case of the President refusing to testify, but it is beyond the power of the law to remedy the evil.^{15a}

It is not a popular idea with the American people that anyone is above the law and they would be quick to resent engrafting such a principle upon our system of jurisprudence. But it should be no offence to say that the President of the United States is above the law. The President is not a man, though a man is President. The President is the highest official of the Government and by the express terms of the Constitution is the executive

^{15a} When Mr. Babcock was prosecuted for committing frauds upon the revenue, President Grant voluntarily testified in his favor. The government was represented by the Attorney General and the Secretary of the Treasury, while Chief Justice Waite took the testimony. Finley's American Executive, 56-n.

branch of the Government. The language of the Constitution is, "*The executive power shall be vested in a President of the United States of America.*" That means all the executive power of the government, without limitation or reserve, is vested in the President, and it is only because the President is clothed with so extraordinary a power that he can be said to be exempt from the operations of the law.

In saying that the President is exempt from the process of the court it must not be understood that such process could not be served upon him immediately upon the expiration of his office. If the President should commit an offense against the criminal statutes of the country, or the criminal statutes of a State, while he would be exempt from prosecution prior to the expiration of his term of office, he could be arrested and prosecuted when his office expired, and so a civil action, which could not be brought against him because he was President, could be brought against him immediately upon the expiration of his term. It is not the man who happens to be President that the law protects, but it is the officer designated as President, who by virtue of his office is the official head of the Government.

A subpoena was directed to the Governor of a State in his individual name, to appear and testify in a certain proceeding and to bring with him a certain bill which had been passed by the Legislature. The Governor declined to obey the order of the subpoena and did not attend the hearing. He sent a letter to the court stating that his declination to attend was not due to any disrespect for the court or the law, "but because he thought his duty required him not to appear or to produce the paper required, or to submit his official acts, as Governor, to the scrutiny of any court." The court said: "Every person, whatever his office or dignity, is bound to appear and testify in courts of justice when required to do so by proper process, unless he has a lawful excuse. The official engagements and duties of the higher officers of government may be, and in many cases are a sufficient excuse. The dignity of the office or the mere fact of official position is not of itself an excuse. . . . Whether the highest officer in the government or state

will be compelled to produce in court any paper or document in his possession is a different question. The rule in such cases is that he will be allowed to withhold any paper or document in his possession, or any part of it, if in his opinion his official duty requires him to do so. There was no reason why the Governor should not be called upon to testify as to the time the bill was delivered to him; that is, a bare fact, that includes no action on his part.

But an order to appear and testify ought not to be made against the Executive of the State, because it might bring the Executive in conflict with the judiciary. If the Executive thinks he ought to testify, in compliance with the opinion of the court, he will do it without an order; if he thinks it to be his official duty, in protecting the right and dignity of his office, he will not comply, even if directed by an order. And in his case, the court will hardly entertain proceedings to compel him by adjudging him in contempt. It will be presumed that the Chief Magistrate intends no contempt, but that his action is in accordance with his views of his official duty."¹⁶ The discretion of the Governor as to producing in court a deposition filed in his office charging official misconduct against a clerk of a court was held not uncontrollable by the court.¹⁷

The President, Vice-President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Important as the subject of impeaching the President is, discussion on it in the Convention was short. As it is valuable as showing the views of the framers of the Constitution on the question, it is inserted here in full.

While the Convention was considering Mr. Randolph's plan relative to the election of an Executive, Mr. Dickinson moved that the Executive be made removable by the National Legislature, on the request of a majority of the legislators of the individual States. It was necessary,

¹⁶ *Thompson v. German Valley R'd. Co.*, 22 N. J. Eq. 111, 113-5.

¹⁷ *Gray v. Pentland*, 2 Serg. and Rawle, 23.

he said, to place the power of removing somewhere, and he did not like the plan of impeaching the great officers of the State.¹⁸ This motion was rejected.¹⁹

Mr. Williamson, seconded by Mr. Davie, then moved that the Executive be removable on impeachment and conviction of malpractice or neglect of duty, which the Convention agreed to.²⁰

Subsequently Mr. Pinckney and Mr. Gouverneur Morris moved to strike out these words, and this caused debate.²¹ Mr. Pinckney observed that the President ought not to be impeachable while in office.

Mr. Davie said: "If he be not impeachable while in office he will spare no efforts or means to get himself re-elected. I consider the power to impeach the President as an essential security for his good behavior."

Mr. Wilson concurred in the necessity of making the President impeachable.

Col. Mason said: "No point is of more importance than that the right of impeachment shall be continued. Shall any man be above justice? Above all, shall that man be above it who can commit the most extensive injustice?" When great crimes were committed he was for punishing the principal as well as the coadjutors.

Dr. Franklin wished the clause retained as favorable to the Executive. It would be the best way to provide in the Constitution for the regular punishment of the Executive, where a misconduct should deserve it, and for his honorable acquittal, where he should be unjustly accused.

Mr. Gouverneur Morris admitted corruption and some few other offenses ought to be impeachable; but thought the cases ought to be enumerated and defined.

Mr. Madison thought it indispensable that some provision should be made for defending the community against the incapacity, negligence or perfidy of the Chief Magistrate. In the case of the executive magistracy, which was to be administered by a single man, loss of capacity or corruption was within the compass of probable events, and either of them might be unfavorable to the republic.

¹⁸ Journal, 95, 96,

¹⁹ Journal, 98.

²⁰ Journal, 98.

²¹ Journal, 392.

Mr. Pinckney did not see the necessity of impeachments, and was sure it ought not to issue from the legislature, who in that case would hold a rod over the Executive, and by that means destroy his independence.

Mr. Gerry urged the necessity of impeachment. "A good magistrate," he said, "will not fear it. A bad one ought to be kept in fear of it." He hoped the maxim would never be adopted here that the Chief Magistrate could do no wrong.

Mr. King thought that under no circumstances ought the Chief Magistrate to be impeachable by the legislature for this would be destructive of his independence and of the principle of the Constitution.

Mr. Randolph said the propriety of impeachments was a favored principle with him. The Executive will have great opportunity of using his power; particularly in time of war, when the military force, and in some respects the public money, will be in his hands. He was aware of the necessity of proceeding with a cautious hand, and of excluding as much as possible the influence of the legislature from the business. He suggested for consideration an idea which had fallen from Col. Hamilton of composing a forum out of the judges belonging to the States, and of requiring some preliminary inquest, whether just ground of impeachment existed.

Mr. Gouverneur Morris's opinion had been changed by the arguments used in the discussion. He was now sensible of the necessity of impeachments if the Executive was to continue for any length of time in office.

The question was then put, "Shall the Executive be removable on impeachments?" and Connecticut, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina and Georgia voted yea; Massachusetts and South Carolina voted nay.²² The Committee of Detail reported: "The Executive shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery or corruption."

Later in the Convention, when this clause came up for consideration, Mr. Gouverneur Morris moved to postpone it because he thought the Supreme Court an improper

²² Journal, 397.

tribunal for the impeachment. The Convention did not again consider the matter, and it was referred to the Committee on Unfinished Business, which changed the provision so as to read: "The Executive shall be removed from his office on impeachment by the House of Representatives, and conviction by the Senate, for treason or bribery."²³

When this report was under consideration in the Convention, Mr. Mason objected to impeachment of the President being restricted to treason and bribery. Treason, said he, as defined in the Constitution, will not reach many great and dangerous offenses. Hastings is not guilty of treason.²⁴ Attempts to subvert the Constitution may not be treason, as defined in the Constitution, and as bills of attainder, which have saved the British Constitution, are forbidden, it is the more necessary to extend the power of impeachments. He thereupon moved to add after "bribery," "or maladministration."

Mr. Madison objected to this expression as being too vague.

Mr. Mason then withdrew the term maladministration and substituted the expression "other high crimes and misdemeanors," which was agreed to by a vote of eight States to three.²⁵ Subsequently the word "State" was struck out and the words "United States" unanimously inserted in its stead, and the clause then passed by a vote of ten States to one. On motion the following was added to the clause: "The Vice-President and other civil officers of the United States shall be removed from office on impeachment and conviction as aforesaid." The whole subject then went to the Committee on Style, which reported the section as it is now found in the Constitution.

This is one of the most important of all the provisions on the subject of impeachment. It enumerates the officers who may be impeached and the crimes for which impeachment will lie, and provides the punishment therefor. The Constitution does not define the term "civil officers," but all civil officers of the Government, including the

²³ Journal, 656.

²⁴ The impeachment trial of Warren Hastings was then in progress before the House of Lords.

²⁵ Journal, 688.

President and Vice-President, are embraced in its provisions. Senators and Representatives are not liable to impeachment, not being civil officers within the meaning of this clause.²⁸ Neither are military and naval officers included. These officials have always been subject to trial by a code peculiar to their professions, and Judge Story says that it was for that reason that they were exempted from impeachment.

In the impeachment of Secretary Belknap, Mr. Jenks, one of the managers on behalf of the House of Representatives, said:

“Why should it be that a civil officer should be impeachable rather than a military officer? Is the one more dangerous than the other? Were the framers of the Constitution more careful to guard one than the other? No. They simply took this into consideration: this provision simply meant that it was imperative that on impeachment for certain crimes of a high grade, civil officers should be removed. Why not military officers? Because military talent is of a peculiar character. One man in an army may not represent only one man, but his name may be good for a thousand; ten thousand or more. Suppose you take the case of the Duke of Marlborough—a man noted perhaps for his avarice—a man who, if he had been prosecuted for official malpractice under our Constitution, would have been removed from office, had this power been extended to military officers as well as civil officers; but to remove the Duke of Marlborough from the head of the armies of England would have been equivalent to yielding her place as a military nation in the face of the world. So there is a reason why military officers should not be necessarily removed. You may remove them. If the demands of the Republic require you should remove them, you should do it, but you are not compelled by the Constitution to do it. This is why it was made applicable to civil officers alone and in reference to civil officers we have daily and hourly indications that if the very best of civil officers were to be removed, highest or lowest, abundance of people would spring up, numerous as the frogs of Egypt, fully competent and amply willing to fill the places. It is restricted as to

²⁸ Senate Journal, January 10, 1797; Rawle on Const. 213.

military officers because of the character of the duties they have to perform; it was restricted as to naval officers for the same reason; and it was not as I apprehend, for the cause suggested by Judge Story, that there were courtsmartial to try their crimes.

“The spirit of our institutions is that the people shall all the time hold their hand on every officer in the United States. As to those that were elected by themselves Congressmen, they placed it in the power of Congress to remove them. As to those that represented the States, they placed it in the power of those representing the States to remove them. That is, they held the power of removal all the time, directly or indirectly, and intrusted it to no single individual. As to the officers of the United States, who are those under the Executive they meant to hold the same hand upon them, and they did hold it. They meant that the military, the maritime, and the civil alike shall be subject to impeachment and trial, and that if it is necessary this court can drag from his height the military hero, or may drag from his depths the depre-dating customhouse officers.”²⁷

It is the accepted doctrine that the language of the Constitution is not broad enough to include military and naval officers among those who may be impeached. The word “civil,” as used in the Constitution, is understood as contradistinguishing civil from military and naval officers of the Government. Judge Story, citing with approval Rawle on the Constitution on this subject, says: “All officers of the United States who hold their appointments under the National Government, whether their duties are executive or judicial in the highest or in the lowest department of the Government, with the exception of officers in the army and navy, are properly civil officers within the meaning of the Constitution, and liable to impeachment.”²⁸

For what offenses Impeachment will lie.—There are two offenses mentioned for which civil officers can be impeached, treason and bribery. It may be asked why these offenses were specifically named to the exclusion of other high crimes. The answer, no doubt, is due to the fact that

²⁷ Belknap's Impeachment Trial, 172, 173.

²⁸ 1 Story on the Constitution, Sec. 792.

English history showed that treason and bribery were the principal crimes for which impeachment had been resorted to by the House of Commons. It was natural that the Convention should assume that those crimes public officials had committed, they would commit again, and therefore the framers named them in the Constitution. As to what constitutes treason, the Senate would not, in case it impeached an officer for that offense, go beyond the definition found in the Constitution. It is probable that the Convention used the term bribery in its common law meaning, which is, "the receiving or offering any undue reward by or to any person whomsoever, whose ordinary profession or business relates to the administration of public justice, in order to influence his behavior in office, and to incline him to act contrary to his duty and the known rules of honesty and integrity."²⁹ The term bribery is said to extend further than the above definition, and to include the offense of giving a bribe to other classes of officers, and also to extend to voters, cabinet ministers, legislators, and sheriffs.

The difficulty lies in the meaning of the expression "other high crimes and misdemeanors." Upon this subject a learned writer has forcefully said:

"As to this, four theories have been proposed: First, that, except treason or bribery, no offense is impeachable which is not declared by a statute of the United States to be a crime subject to indictment. Second, that no offense is impeachable which is not subject to indictment by such a statute or by the common law. Third, that all offenses are impeachable which were so by that branch of the common law known as the law of Parliament. Fourth, that the House and Senate have the discretionary power to remove and stigmatize by perpetual disqualification an officer subject to impeachment for any cause that to them seems fit."³⁰

To this classification but little exception is taken, but the doctrine is rejected which holds that an offense is not impeachable unless made a crime by the statutes of the United States, although this position has been maintained

²⁹ Bouvier's Law Dictionary.

³⁰ Foster on the Constitution, 582.

by eminent authority.³¹ After enumerating that impeachment will lie for treason and bribery, the Constitution says that it will also lie for "other high crimes and misdemeanors." Blackstone says that a crime or misdemeanor is an act committed, or omitted, in violation of a public law either forbidding or commanding it, though crime in a narrower sense is distinguished from a misdemeanor as being an offense of a deeper and more atrocious dye, and usually amounting to a felony.³²

A misdemeanor comprehends all indictable offenses which do not amount to a felony; as perjury, battery, libels, conspiracies, attempts and solicitations to commit felonies, etc.³³ These seem to be the definitions of these terms at common law, but it would be strange if a civil officer could be impeached for only such offenses as are embraced within the common law definition of "other high crimes and misdemeanors." There is a parliamentary definition of the term "misdemeanor," and a modern writer on the Constitution has said: "The term 'high crimes and misdemeanors' has no significance in the common law concerning crimes subject to indictment. It can only be found in the law of Parliament, and is the technical term which was used by the Commons at the Bar of the Lords for centuries before the existence of the United States."³⁴ Synonymous with the term "misdemeanor" are the terms misdeed, misconduct, misbehavior, fault, transgression.³⁵

Suppose the President of the United States should insist upon using the White House for some purpose which would bring moral disgrace upon the nation and the established rules of civilized society. Is it to be claimed that he would not be liable to impeachment for such conduct because the offense was not indictable under a federal law? Or suppose he should refuse to perform the duties, or some of them, which the Constitution enjoins upon him? Would it be claimed that he was not

³¹ Judge Curtis' notable argument in his defense of President Johnson, and Professor Dwight's article on impeachment in VI American Law Register, 268.

³² 4 Blackstone, 5.

³³ 4 Blackstone, 5, note.

³⁴ Foster on the Constitution, 586.

³⁵ Webster's International Dictionary.

impeachable? In *Mississippi v. Johnson*, supra, Chase, C. J., asked, "May not the House of Representatives impeach the President for refusing to execute the laws of Congress?" Suppose the Vice-President should refuse to preside over the Senate, or to discharge any of the duties incumbent upon his high office? There is no statute under which he could be indicted and consequently he would escape punishment and would continue to hold his office and embarrass the operation of the Government, but will it be claimed that he would not be subject to impeachment? The managers on behalf of the House of Representatives in the impeachment of President Johnson crystallized the doctrine of impeachable offenses into the following rule: "*An impeachable crime or misdemeanor is one in its nature or consequence subversive of some fundamental or essential principle of Government or highly prejudicial to the public interest, and this may consist of a violation of the Constitution, of law, of an official oath, or of duty, by an act committed or omitted, or, without violating a positive law, by the abuse of discretionary powers from improper motives, or from any improper purpose.*"³⁶

This states the doctrine and supports it by a long line of authorities that the Senate of the United States is not deprived of its jurisdiction to impeach an offending officer, unless his offense is indictable under a federal statute. Misconduct in office, whether it be the exercise of assumed power, or the nonexercise of a rightful power, is ground for impeachment. John Quincy Adams, after he had been President, said in a printed report to Congress, that a President might be impeached for an abuse of the veto power.³⁷ When the Constitution was being considered in the Virginia Convention, the subject of treaty being under consideration, Madison said: "Were the President to commit anything so atrocious as to summon only a few States, he would be impeached and convicted, as a majority of the States would be affected by his misdemeanor."³⁸ And he also stated that incapacity, negligence or perfidy of the Chief Magistrate would con-

³⁶ Proceedings in the Trial of Andrew Johnson. 58.

³⁷ House of Representatives on the veto of the Tariff Bill, 22nd Congress, Second Session, Vol. 5, No. 998.

³⁸ Elliot's Debates, Vol. 5, 500, 516.

stitute grounds for impeachment;³⁹ and that the President would be subject to impeachment for corrupting electors, and for incapacity, and that for the latter offense he should be punished by degradation from office.⁴⁰

While a member of Congress, Mr. Madison, in his great speech on the President's power of removal, said: "If an unworthy man be continued in office by an unworthy President, the House of Representatives can at any time impeach him, and the Senate can remove him whether the President chooses or not. The danger then consists merely in this, the President can displace from office a man whose merits require that he should be continued in it. What will be the motive which the President can have for such abuse of his power, and the restraint that operates to prevent it? In the first place he will be impeachable by this House before the Senate for such an act of maladministration, for I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust."⁴¹

A civil officer may so behave himself in public as to bring disgrace upon himself and shame upon his country, and he may continue to do this until his name would become a national stench, and yet he would not be subject to indictment by any law of the United States, but he certainly could be impeached. What will those who advocate the doctrine that impeachment will not lie except for an offense punishable by statute, do with the constitutional provision relative to judges which says, "Judges, both of the supreme and inferior courts, shall hold their offices during good behavior?" This means that as long as they behave themselves their tenure of office is fixed, and they can not be disturbed. But suppose they cease to behave themselves? When the Constitution says, "A judge shall hold his office during good behavior," it means that he shall not hold it when it ceases to be good. Suppose he should refuse to sit upon the bench and discharge the duties which the Constitution and the law enjoin upon him, or should become a notoriously corrupt character, and live a notoriously cor-

³⁹ Madison Papers, Vol. 5, 341.

⁴⁰ Madison Papers, Vol. 5, 343.

⁴¹ Elliot's Debates, Vol. 4, 380.

rupt and debauched life? He could not be indicted for such conduct, and he could not be removed except by impeachment. Would it be claimed that impeachment would not be the proper remedy in such a case?

An examination of the impeachment trials of federal judges will disclose the fact that no judge was impeached for an offense indictable under a federal statute, except in the case of Judge Humphreys, where treason was one of the grounds of the impeachment, but upon close examination it is exceedingly doubtful if that charge could be maintained, although he was found guilty. Judge Humphreys was a Southern man, and his offense, if any, was at the beginning of the Civil War, when party and sectional feeling was intensely aroused. It is very doubtful if, under a calm and dispassionate consideration of the charges, he would have been convicted of treason.

Offenses and Conduct for which State Judges have been Impeached.—Judges of State Courts have been impeached for drunkenness, either habitual, or occurring in the performance of their official duties;⁴² misbehavior in office; gross indecency and lewdness,⁴³ using gross, obscene and indecent language while in the discharge of official duties, or the abuse or reckless exercise of judicial power⁴⁴ and the omission to discharge a plain, official, judicial duty imposed by statute or common law. There have been several impeachments on this last ground.⁴⁵ A public speech by a judge when not holding court which encourages insurrection,⁴⁶ is another ground. "Where an act of official delinquency consists in the violation of the Constitution, or statutes, which is denounced as a crime or misdemeanor, or where there is a wilful neglect of duty, with a corrupt intention, or where an act of negligence is so gross, and the disregard of duty so flagrant as to warrant the inference that it is wilful and corrupt, it is within the definition of a misdemeanor in office. But where an act consists of a mere error of judgment or

⁴² Impeachment of Theodosius Botkin of Kansas.

⁴³ Impeachment of Judge E. St. Julien Cox, of Minnesota.

⁴⁴ Impeachment of Judge George G. Barnard of New York.

⁴⁵ Impeachment trials of Judges Pickering, Humphreys, Addison, Prescott, Holden, Fraziers, and Barnard.

⁴⁶ Impeachment trials of Hardy and Humphreys.

omission of duty without the element of fraud, and where the negligence is attributable to a misconception of duty rather than a disregard thereof, it is not impeachable, although it may be highly prejudicial to the interests of the State.''⁴⁷

But impeachment will not lie for an error in judgment which is made in good faith by a judge.

⁴⁷ *State v. Hastings*, 37 Nebraska 96.

CHAPTER XL.

FEDERAL COURTS BEFORE THE CONSTITUTION.

In the order of the Constitution the legislative and executive articles are followed by the judiciary, but it has been considered appropriate before entering upon the consideration of that important subject to notice the rise of the federal judicial system and the establishment of federal courts under the Articles of Confederation.

From the meeting of the second Continental Congress in 1775 to 1789, when the government of the United States went into operation, was fourteen years. During this period different tribunals or courts, having jurisdiction over certain questions of a national character, were established. They were wholly independent of the colonial or State courts, and their decisions were final.

These courts were of four kinds, and existed in the following order:

First. Courts composed of special committees of Congress.

Second. Courts composed of standing or permanent committees of Congress.

Third. The Court of Appeals in Cases of Capture.

Fourth. Courts under the Articles of Confederation.

Courts composed of Special Committees 1775-1777.—

The first judicial tribunal or court possessing national authority among the colonies was established by the second Colonial Congress. It was limited in its jurisdiction to cases involving prize and admiralty. The necessity for such a tribunal became apparent soon after the declaration of war between the American colonies and England, for the seizure of vessels on the high seas rapidly increased after the beginning of the war, and there was no tribunal authorized to determine the rights of parties in such cases. At first the controversies growing out of such seizures were referred for decision to General Washington, but he was so occupied with the military operations of the government that he had no time to consider

questions involving civil and maritime jurisdiction, and consequently recommended to Congress that it create a court with final authority to hear and determine all controversies relating to prize and capture, in a letter written from Cambridge, Massachusetts, on November 11, 1775, four months after he took command of the Continental army, to Peyton Randolph, President of the Continental Congress, as follows:

"Enclosed you have a copy of an act passed this session, by the honorable council and house of representatives of this province. It respects such captures as may be made by vessels fitted out by the province, or by individuals thereof. As the armed vessels, fitted out at the Continental expense, do not come under this law, I would have it submitted to the consideration of Congress, to point out a more summary way of proceeding to determine the property and mode of condemnation of such prizes, as have been or hereafter may be made, than is specified in this act.

"Should not a court be established by authority of Congress, to take cognizance of prizes made by the Continental vessels? Whatever the mode is, which they are pleased to adopt, there is an absolute necessity of its being speedily determined on; for I cannot spare time from military affairs, to give proper attention to these matters."

On receipt of Washington's letter, Congress referred it for consideration and report to a committee,² and on November 25, after hearing the report of the committee, Congress agreed:

1. "That it be and is hereby recommended to the several legislatures in the United Colonies, as soon as possible to erect courts of justice, or give jurisdiction to the courts now in being for that purpose of determining concerning the captures to be made as aforesaid, and to provide that all trials in such case be had by a jury under such qualifications, as to the respective legislatures shall seem expedient.

¹ Sparks' Writings of Washington, vol. 3, 154.

² The following were the members of the committee: Mr. Wythe, Mr. Rutledge, Mr. J. Adams, Mr. Livingston, Dr. Franklin, Mr. Wilson and Mr. Johnson. Journal of Congress, 251.

2. "That all prosecutions shall be commenced in the court of that colony in which the capture shall be made, but if no such court be at that time erected in the said colony, or if the capture be made upon the sea, then the prosecution shall be in the court of such colony as the captor may find most convenient, provided that nothing contained in the resolution shall be construed so as to enable the captor to remove his prize from any colony competent to determine concerning the seizure, after he shall have carried the vessel so seized within any harbor of the same.

3. "That in all cases an appeal shall be allowed to the Congress, or to such person or persons as they shall appoint for the trial of appeals, provided the appeal be lodged within five days after definitive sentence, and such appeal be lodged with the secretary of Congress within forty days afterwards, and provided the party appealing shall give security to prosecute the said appeal to effect, and in case of death of the secretary during the recess of Congress, then the said appeal to be lodged in Congress within twenty days after the meeting thereof."

A copy of these resolutions was sent by Congress to General Washington, who evidently had not received it prior to the 4th of December following, for on that day he again wrote the president of that body:

"It is some time since I recommended to the Congress, that they would institute a court for the trial of prizes made by the Continental armed vessels which I hope they have ere now taken into their consideration; otherwise I should again take the liberty of urging it in the most pressing manner."³

This letter was followed by another from Washington to the President of Congress on the 14th of the same month, in which he acknowledges receipt of the resolutions of November 25, as follows:

"I received your favor of the 2d instant, with the several resolves of Congress therein enclosed. The resolves relative to captures made by Continental armed vessels only want a court established for trial, to make

³ Journal of Congress, 259, 260.

⁴ Sparks' Washington, vol. 3, 184.

them complete. This, I hope, will be soon done, as I have taken the liberty to urge it often to the Congress."⁵

The resolutions of Congress were not in compliance with Washington's suggestion. He had asked that a court be established for the trial of prizes made "by Continental armed vessels." Instead of creating such a court, Congress recommended that the legislatures of the respective colonies create courts for that purpose, or, confer such jurisdiction on existing colonial courts, and provided that in all cases an appeal should be allowed to Congress, or to such person or persons as Congress should appoint for the trial of appeals. This was not what the Commander-in-Chief had asked of Congress, but it was all that Congress, at that time, seemed willing to do.

Washington's disappointment at the conduct of Congress in not complying with his recommendation that a court of admiralty be established is apparent from the following letter written December 26, 1775, to Richard Henry Lee:⁶

"I need not repeat them, but I must beg of you, my good sir, to use your influence in having a court of admiralty or some power appointed to hear and determine all matters relative to captures; you cannot conceive how I am plagued on this head, and how impossible it is for me to hear and determine upon matters of this sort, when the facts, perhaps, are only to be ascertained at ports, forty, fifty, or more miles distant, without bringing the parties here at great trouble and expense. At any rate my time will not allow me to be a competent judge of this business."

Under the resolution of Congress of November 25, 1775, an appeal could be had from the colonial trial courts, to Congress or to such person or persons, as Congress might appoint, to hear and determine such appeals. As a rule, Congress did not hear the appeals, but as each case was appealed, a special committee was appointed to hear it.

Whether it was because this practice was unsatisfactory, or for other reasons, Congress appointed a committee to review the resolutions which had been passed

⁵ Sparks' Washington, vol. 3, 196.

⁶ Sparks' Washington, vol. 3, 217.

on the subject of captures at sea, and report their conclusions thereon.⁷

Courts of Standing or Permanent Committees 1777-1780.

—As a result of the report of the committee, Congress, on January 20, 1777, passed a resolution providing for the appointment of a *standing or permanent committee* of five members, which was afterwards increased to eight, to hear and determine appeals; and the practice of appointing a special committee to hear each case as it was appealed was superseded after it had been in force for two years, by the permanent committee for that purpose.⁸

This committee⁹ continued for only five months, for it was determined on May 8, 1777, that it was too numerous, and that a new committee of five be appointed, and that they, or any three of them, might hear and determine appeals brought to Congress.¹⁰

The tribunal or court known as the Standing or Permanent Committee for the Trial of Appeals, was in force from 1777 to 1780, when it was succeeded by the Court of Appeals in Cases of Capture.

The Court of Appeals in Cases of Capture, 1780.—

On Saturday, January 15, 1780, it was resolved by Congress that a court be appointed for the trial of all appeals from the courts of admiralty in these United States, in cases of capture, to consist of three judges, appointed and commissioned by Congress, two of whom could hold court for the dispatch of business; that the said court appoint their own register; that the trials therein be according to the usage of nations, and not by jury; that the said judges hold their first session as soon as may be at Philadelphia, afterwards at such times and places as they shall judge most conducive to the public good,

⁷ This committee consisted of George Wythe, John Rutledge, Robert Treat Paine, and Samuel Huntington.

⁸ The original committee consisted of Mr. Wilson, Mr. Sergeant, Mr. Ellery, Mr. Chase, and Mr. Sherman. Subsequently, Mr. John Adams, Mr. Read and Mr. Burke were added to the committee by resolution.

⁹ The committee of May 8 consisted of Mr. Wilson and Mr. Sergeant, of the former committee, Mr. Duane, Mr. John Adams and Mr. Burke.

¹⁰ 3 Journal of Congress, 175.

so that they do not at any time sit farther eastward than Hartford in Connecticut, or southward than Williamsburg in Virginia; that the salary of the said judges be fixed on the first Monday in next July, and that in the interim the sum of \$12,000 be advanced to each of them; that Saturday next be assigned for electing the judges of the Court of Appeals, and that in the meanwhile nominations be made.¹¹

On the following Saturday, January 22, 1780, Congress elected the judges of the Court of Appeals. The vote was by ballot, and resulted in the election of Mr. Wythe, Mr. Paca and Mr. Hosmer; Mr. Hosmer and Mr. Paca having an equal number of votes.¹²

Four months after, on Wednesday, May 24, 1780, Congress resolved that the "stile of the Court of Appeals appointed by Congress" be "The Court of Appeals in Cases of Capture," and it was further

"Resolved, That appeals from the courts of admiralty in the respective States, be, as heretofore, demanded within five days after sentence, and in future such appeals be lodged with the register of the Court of Appeals in Cases of Capture within forty days thereafter, provided the party appealing shall give security to prosecute such appeal to effect.

*"Resolved, That the matters respecting appeals in cases of capture, now depending before Congress, or the commission of appeals, consisting of members of Congress, be referred to the newly erected Court of Appeals, to be there adjudged and decreed according to law; and that all papers touching appeals, in cases of capture, lodged in the office of the secretary of Congress, be delivered to and lodged with the register of the Court of Appeals."*¹³

A court possessing final authority throughout the United States had at last been established. Six years after Congress had been repeatedly urged by Washington to create such a tribunal, it had been done. It is difficult at this distant day to understand why there should have been such delay in a matter of so great importance, but it

¹¹ 6 Journals of Congress, 14.

¹² 6 Journals of Congress, 17.

¹³ Journals of Congress, 156.

must be remembered that Congress was constantly occupied with all the momentous affairs of the government. There was no chief executive to advise and direct Congress what to do; there was no division of Congress into a Senate and House of Representatives, so that each body could originate legislation and hasten its passage. The Army was in the field, and the whole responsibility of maintaining it and conducting the Revolution, fell upon Congress. Delay in some matters, important though they were, may be excused under such trying circumstances and in the midst of such great responsibilities.

The Court of Appeals was in existence for a period of six years, during which time it disposed of fifty-six cases, forty-five of which were appealed to it directly, and eleven were transferred from the standing committees of Congress. The business of the court largely decreased after the close of the war and at the conclusion of the term of court held in Philadelphia in May, 1784, the judges wrote the President of Congress that "all the causes which have been brought before the court, were determined, and although some motions had been made for rehearings, they had not been admitted; since that time no further application had been made by the court to us. Of this we further think it is our duty to inform Congress that they may make such order as they may think proper."

Congress, on February 9, 1786, having resolved that "as the war was at an end, and the business of the court in a great measure done away, attention to the interests of their constituents made it necessary that the salaries of the said judges should cease."¹⁴ It appears, however, that this resolution was premature, for on June 27 following, on report of a committee,¹⁵ it was resolved that the judges of the Court of Appeals be authorized and directed in every cause which has been or may hereafter be brought before them, to sustain appeals and grant rehearings, or new trials of the same, wherever justice and right may, in their opinion, require it, and

¹⁴ 11 Journals of Congress, 25.

¹⁵ The committee consisted of Mr. Pinckney, Mr. King, Mr. Johnson, Mr. Grayson and Mr. Hindman.

that the said court assemble at the city of New York, on the first Monday of November next, for the dispatch of such business as may then and there be before them; and that the secretary of Congress take order for publishing those resolutions for the information of all persons concerned.¹⁶

The court held three sessions, the first and second in the city of New York, and the third in the city of Philadelphia. On May 8, 1787, it adjourned without date, and the first court, so named and styled, possessing national jurisdiction in the United States, ceased to exist.

Subsequently, an act of Congress, passed on May 8, 1792, provided that all the records and proceedings of the Court of Appeals should be deposited in the office of the Supreme Court of the United States, where they are still kept.

The formation of a new government in the British colonies in America is ordinarily considered to date from the Declaration of Independence. Of that important event a distinguished writer on American constitutional law has said:

"The Declaration of Independence in July, 1776, operated as a permanent transfer from the Crown of England of the high national powers lately exercised by Congress, and was naturally followed by the establishment of a regular government, amongst whose different departments those powers might be distributed. Accordingly, the day after that on which the Declaration of Independence was resolved on by Congress, in a committee of the Whole (June 11, 1776), a proposition was made and a committee appointed to prepare and digest the form of a confederation to be entered into between the colonies."¹⁷

Strong evidence of the hope and faith which the colonists had of their ultimate success in the struggle with Great Britain, is found in the fact that on the day following the adoption of the Declaration of Independence, Congress passed a resolution¹⁸ providing for

¹⁶ 11 Journals of Congress, 87, 88.

¹⁷ Sergeant, Constitutional Law, 13.

¹⁸ Journal of Congress, 207.

the appointment of a committee¹⁹ to prepare articles of confederation, for the more perfect government and unification of the States, and which it was hoped they would adopt.

This was the most important resolution submitted by either Colonial Congress, except the one which provided for the appointment of a committee to draft a Declaration of Independence and separation of the American colonies from England.

The Articles of Confederation prepared by the committee were adopted by Congress with slight verbal alterations on November 17, 1777.²⁰

The articles were not to be binding until they were ratified by the legislature of each State. The year after their adoption by Congress, eleven of the thirteen States ratified them, and another in the following year; but it was not until March 1, 1781, that the ratification of the last State was secured. The announcement of the final ratification was made by Congress on March 17, 1781, on which day the government under the Articles of Confederation and perpetual union between the States began. While the judicial authority conferred upon Congress by the Articles of Confederation was much greater and more clearly defined than it had been prior to their adoption, it was still limited, and as a consequence only an imperfect judicial system was established.

The ninth article of the Articles of Confederation provided that the United States in Congress Assembled should have the sole and exclusive right:

First. "Of establishing rules for deciding in all cases, what captures on land and water should be legal, and in what manner prizes taken by land or naval forces in the service of the United States should be divided or appropriated.

Second. "Of appointing courts for the trial of piracies and felonies committed on high seas.

Third. "Of establishing courts for receiving and determining finally appeals in all causes of capture."

¹⁹ The committee consisted of Mr. Bartlett, Mr. S. Adams, Mr. Hopkins, Mr. Sherman, Mr. R. R. Livingston, Mr. Dickinson, Mr. McKean, Mr. Stone, Mr. Nelson, Mr. Hewes, Mr. E. Rutledge and Mr. Gwinnett.

²⁰ Journal of Congress, 502.

The same article provided:

First. "The United States in Congress Assembled, shall also be the last resort on appeal in all disputes and differences subsisting, or that may hereafter arise, between two or more States concerning boundary, jurisdiction or any other cause whatever," and the manner in which this authority should be exercised was most minutely provided for.

Second. "Of determining all controversies concerning the private right of soil claimed under different grants of two or more States."

Courts under the Articles of Confederation 1781-1789.—

Acting under the authority conferred upon it by the ninth article of the Articles of Confederation, Congress, on April 5, 1781, ordained that the justices of the Supreme or Superior Court of Adjudicature, and the judge of the court of admiralty, of the several and respective States, or any two or more of whom, are constituted and appointed judges for the trial of persons committing piracy or felony upon the high seas; and that such crimes should be inquired into, tried and judged by grand and petit juries according to the course of the common law.²¹

The provision that piracies and felonies on the high seas should be inquired into by a grand jury, was the first recognition of the functions of the grand jury by Congress in the administration of justice through national tribunals.

The Court of Appeals established by the act of 1780 was continued under the Articles of Confederation, although the construction placed upon the articles by some of the State courts limited the judicial power of Congress in certain cases.²²

Acting under the authority conferred upon it by the Articles of Confederation to decide controversies between different States concerning boundaries, Congress, on August 28, 1782, appointed a commission²³ which should sit with all the powers of a court to hear and determine a controversy which had long existed between the State of Pennsylvania and the State of Connecticut

²¹ 7 Journal of Congress, 77.

²² Sergeant's Constitutional Law, 14.

²³ 8 Journal of Congress, 84.

respecting certain lands. The court met at Trenton, New Jersey, on November 12, 1782, and continued to hold daily sessions until December 30, of the same year, when it pronounced the following judgment:

"This cause has been well argued by the learned counsel on both sides. The court are now to pronounce their sentence of judgment. We are unanimously of opinion that the State of Connecticut has no rights to the lands in controversy."²⁴

The judicial authority of Congress was also invoked to settle controversies between other States, but the differences were finally adjusted by the States themselves, without the aid of the court.

The term "National or Federal Judiciary," ordinarily is understood to mean the judiciary established by the Federal Constitution and the laws of Congress, but a study of the subject shows that for a considerable period of time before the adoption of our Constitution, Congress exercised the function of a national court of final jurisdiction in certain matters, through the agency of committees, and that subsequently a Court of Appeals was created, with adequate jurisdiction and final power in special cases, and that under the Articles of Confederation, provisions were made for a more enlarged judicial system, which continued until it was superseded by the system established under the judiciary clause of the Federal Constitution.

²⁴ The members of the commission were William Whipple, of New Jersey; Welcome Arnold, of Rhode Island; David Brearley and William C. Houston, of New Jersey, and Cyrus Griffin, of Virginia.

CHAPTER XLI.

THE JUDICIAL POWER.

The Convention having vested the legislative power of the Government in the first article, and the executive power in the second, vested the judicial power in the third article.

The establishment of the judicial system of the United States was perhaps the most successful work of the Convention. No part of the Constitution has reflected greater credit or wisdom upon its framers than this article.

It consists of three sections and these will be considered in their order.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time, ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuation in Office.

That the sentiment of the Convention which framed the Constitution favored the establishment of a federal judiciary which should be one of the coordinate branches of the Government, and endowed with full judicial power, was indicated by the fact that each plan of a Constitution submitted to the Convention provided for the creation of a supreme and other judicial tribunals.

On the question of creating a supreme judicial tribunal, there seems to have been no difference of opinion among the members of the Convention. We have already stated that the want of a separate and independent judiciary was one of the great weaknesses of the Confederation. Hamilton said, "The want of a judiciary power was a circumstance which crowned the defects of the Confedera-

tion."¹ It was no doubt the experience of the members of the Convention arising from the limited judicial system under the Articles that caused a unanimous demand for a separate, independent and supreme judicial tribunal.

The federal judicial system, contrary to what some writers have asserted and is generally supposed, was not a new or original creation of the Convention. This is shown by the fact that in most, if not all the States, a similar system existed with which the members of the Federal Convention must have been familiar. The statement of Hamilton on this subject should be accepted as authoritative. Concerning it he says:

¹ The Federalist No. 22.

Speaking in 1826 in the United States Senate of the power of the Supreme Court, Mr. Van Buren, afterwards President of the United States, said:

"It has been justly observed elsewhere that 'there exists not upon earth, and there never did exist, a judicial tribunal clothed with powers so various and so important' as the Supreme Court. . . . Not only are the acts of the National Legislature subject to its review, but it stands as the umpire between the conflicting powers of the General and State governments. That wide field of debatable ground between those rival powers is claimed to be subject to the exclusive and absolute dominion of the Supreme Court. . . . In virtue of this power, we have seen it holding for naught the statutes of powerful States, which had received the deliberate sanction, not only of their legislatures, but of their highest judicatories, composed of men venerable in years, of unsullied purity, and unrivalled talents—statutes on the faith of which immense estates had been invested, and the inheritance of the widow and the orphan were suspended. You have seen such statutes abrogated by the decision of this court, and those who had confided in the wisdom and power of the State authorities, plunged in irremediable ruin. Decisions final in their effect and ruinous in their consequences. I speak of the power of the court, not of the correctness or incorrectness of its decisions. With that we have here nothing to do.

"But this is not all. It not only sits in final judgment upon our acts, as the highest legislative body known to the country—it not only claims to be arbiter between the Federal and State Governments—but it exercises the same great power between the respective States forming this great Confederacy, and *their own citizens*. . . . Add to the immense powers of which I have spoken, those of expounding treaties, . . . of deciding controversies between the States of the Confederacy themselves, and between the citizens of the different States; and the justice of the remark will not be questioned, that there is no known judicial power so transcendently omnipotent as that of the Supreme Court of the United States." Abridgment of Congressional Debates, vol. 8, 500, 502.

"These considerations teach us to applaud the wisdom of those States who have committed the judicial power in the last resort, not to a part of the Legislature, but to distinct and independent bodies of men. Contrary to the supposition of those who have represented the plan of the Convention, in this respect as novel and unprecedented, it is but a copy of the Constitutions of New Hampshire, Massachusetts, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, and the preference which has been given to these models is highly to be commended."²

The establishment by a written Constitution of a separate branch of the Government which would possess such power as would naturally and of right belong to the judicial department was, at the time of its creation, and still is a matter of such moment that the assertion of a rather full account of the plans submitted and the debates which occurred in the Convention on this important subject seems desirable. It is only by an examination of the proceedings of the Convention that we can get the spirit, the ideal purpose, the motives and philosophical conception, which animated the framers of the Constitution. They were intensely earnest in their work, and differed in their opinions on many of the great questions which came before them, and it is these differences of opinion, this clashing of the great minds of the Convention, that the student must understand if he would know either the spirit or the letter of the Constitution.

Plans for the establishment of the Judiciary.—Mr. Randolph's plan was "that a national judiciary be established to consist of one or more supreme tribunals, and of inferior tribunals."³

Mr. Pinckney's, "that the Legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity and admiralty as shall be necessary. One of these shall be termed the Supreme Court."⁴

² The Federalist, No. 81.

³ Journal, 62.

⁴ Journal, 70.

Mr. Paterson's, "that a federal judiciary be established, to consist of a supreme tribunal."⁵

Mr. Hamilton's, "the supreme judicial authority to be vested in judges."⁶

The Supreme Court is the creation of the Constitution and Congress can not abolish it. If that body should refuse to fix the compensation of the members of the court, or refuse to appropriate money for their compensation, it would in either case be a violation of the Constitution, for that instrument provides that the members of the court shall receive a compensation at stated times.⁷

⁵ Journal, 163.

⁶ Journal, 186.

⁷ In *Gordon v. United States*, Chief Justice Taney used this language in reference to the Supreme Court:

"The Supreme Court does not owe its existence or its powers to the legislative department of the government. It is created by the Constitution, and represents one of the three great divisions of power in the Government of the United States, to each of which the Constitution has assigned its appropriate duties and powers, and made each independent of the other in performing its appropriate functions.

"The existence of this court is, therefore, as essential to the organization of the government established by the Constitution as the election of a president or members of Congress. It is the tribunal which is ultimately to decide all judicial questions confided to the Government of the United States. No appeal is given from its decisions, nor any power given to the legislative or executive departments to interfere with its judgments or process of execution. Its jurisdiction and powers and duties being defined in the organic law of the government, and being all strictly judicial, Congress can not require or authorize the court to exercise any other jurisdiction or power, or perform any other duty.

"The reason for giving such unusual power to a judicial tribunal is obvious. It was necessary to give it from the complex character of the Government of the United States, which is in part National and in part Federal: where two separate governments exercise certain powers of sovereignty over the same territory, each independent of the other within its appropriate sphere of action, and where there was, therefore, an absolute necessity, in order to preserve internal tranquillity, that there should be some tribunal to decide between the Government of the United States and the government of a State whenever any controversy should arise as to the relative and respective powers in the common territory. The Supreme Court was created for that purpose, and to insure its impartiality it was absolutely necessary to make it independent of the legislative power, and the influence direct or indirect of Congress and the Executive. Hence the care with which its jurisdiction, powers, and duties are

The Supreme Court was created and its jurisdiction determined by the act of September 24, 1789.⁸ It consisted of a chief justice, and five associate justices.

The act prescribed the following oath which the justices took before entering upon the discharge of their duties, and which is still the form of oath taken by all federal judges.

"I,, do solemnly swear or affirm that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States; so help me God."⁹

The same act created a district court in each State and provided for the appointment of a judge in each district. It also created three circuits and provided that in each circuit there should be held a circuit court to consist of two justices of the Supreme Court and a district judge.¹⁰

defined in the Constitution and its independence of the legislative branch of the government secured. . . . It was to prevent an appeal to the sword and a dissolution of the compact that this court by the organic law, was made equal in origin and equal in title to the legislative and executive branches of the government; its powers defined, and limited, and made strictly judicial, and placed therefore beyond the reach of the powers delegated to the Legislative and Executive departments." 117 U. S. (appendix), 699.

⁸ 1 U. S. Statutes at Large, 73.

⁹ 1 U. S. Statutes at Large, 76.

¹⁰ The great act commonly called the judiciary act of September 24, 1789, originated in the Senate. One member of the committee which reported it, Oliver Ellsworth, afterwards became Chief Justice of the Supreme Court, and another member, William Paterson, associate justice of the same court. Five of the members had also been deputies to the Convention which framed the Constitution. It may be said that the authors of this act, as well as the Congress which adopted it, were adherents of the political party which held that it was indispensable to the peace and unity of the country that the authority of the Federal Government should be extended as far as it could be constitutionally. So it has been considered, and justly so, as an authoritative and contemporaneous exposition of the limits of the judicial power of the General Government. Miller on the Constitution, 335, note.

In his opinion in *Cohens v. Virginia*, Mr. Chief Justice Marshall

The question soon arose with many of the statesmen and jurists of that day whether that portion of the act requiring the justices of the Supreme Court to hold the circuit courts was constitutional. How could judges of a court created by the Constitution be compelled to sit as judges of a court created by a statute? That the

said, "Congress seems to have intended to give its own construction to this part of the Constitution, in the twenty-fifth section of the judiciary act; and we perceive no reason to depart from that construction." 6 Wheaton 264.

The authorship of this act is generally conceded to Ellsworth, but Mr. Van Buren attributes it to Hamilton. Referring to the 25th section of the act he says, "It was this provision in the *judiciary act* which more than all other things combined, made that department—which Montesquieu described as next to nothing in point of power, and upon the weakness of which Hamilton before the passage of that act descanted so freely—the most formidable and overshadowing branch of the government. The section bears the impress of his mind, and if not the work of his pen was beyond all doubt the result of his suggestion. Hamilton was not a member then, but we have seen that he made speeches in Congress through another, and I have not a doubt that, if the truth could now be known, it would appear that few things were said or done on one side, in either branch of that body, of which he did not make a part in some form." Van Buren, *Political Parties in the United States*, 294, 295.

On Sept. 26, 1789, Ralph Izard, a member of the United States Senate from South Carolina, wrote Edward Rutledge as follows:

"I am just returned from the Senate where the following officers have been approved—Mr. Jay, Chief Justice; judges of the Supreme Court, J. Rutledge, Cushing, Wilson, Harrison, and Blair; Edmund Randolph, Attorney General. The judges of the Supreme Court are chosen from among the most eminent and distinguished characters in America, and I do not believe any judiciary in the world is better filled. The President asked me before the nominations were made, whether I thought your brother John, General Pinckney, or yourself would accept of a Judge in the Supreme Court. I told him that I was not authorized to say you would not, but intimated that the office of Chief Justice would be most suitable to either of you. That, however, was engaged. Mr. Jay's office has this day been filled by Mr. Jefferson, who is expected here soon from France. The home department is added to it, and the name of the office changed. Mr. Jefferson is called Secretary of State. I hope it may suit your brother to accept, if it should only be for two or three years; as it is of the first importance that the judiciary should be highly respectable. . . . The President will not nominate any but the most eminent, and if none in South Carolina of that description will accept, he will be obliged to have recourse to some other State." Am. Hist. Rev., July, 1909, 777.

question was not only of deep interest, but was embarrassing, is apparent from the history of the times as also from the following letter, which was addressed by President Washington to the Chief Justice and the associate justices, and the answer thereto, each of which is here published not only because of its historical interest, but because the answer of the Chief Justice and his associates discloses their opinion of the constitutionality of the law requiring them to sit as circuit judges:

“United States, April 3, 1790.

“Gentlemen: I have always been persuaded that the stability and success of the national government, and consequently the happiness of the people of the United States would depend, in a considerable degree, on the interpretation of its laws. In my opinion, therefore, it is important that the judiciary system should not only be independent in its operations, but as perfect as possible in its formation.

“As you are about to commence your first circuit, and many things may occur in such an unexplored field which it would be useful should be known, I think it proper to acquaint you, that it will be agreeable to me to receive such information and remarks on this subject as you shall from time to time judge it expedient to make.

“Geo. Washington.

“The Chief Justice and Associate Justices
of the Supreme Court of the United States.”

“Sir: We, the Chief Justice and Associate Justices of the Supreme Court of the United States, in pursuance of the letter which you did us the honor to write on the third day of April last, take the liberty of submitting to your consideration the following remarks on the ‘Act to establish the judicial courts of the United States.’

“It would doubtless have been singular if a system so new and untried, and which was necessarily formed more on principles of theory and probable expediency, than former experience, had, in practice, been found entirely free from defects.

“The particular and continued attention which our offi-

cial duties called upon us to pay to this act, has produced reflections which, at the time it was made and passed, did not probably occur in their full extent either to us or others.

"On comparing this act with the Constitution, we perceive deviations which, in our opinions, are important.

"The first section of the third article of the Constitution declares, that 'the judicial power of the United States shall be vested in one *Supreme* Court, and in such inferior courts as the Congress may from time to time ordain and establish.'

"The second section enumerates the cases to which the judicial power shall extend. It gives to the Supreme Court original jurisdiction in only *two* cases, but in all the others vests it with *appellate* jurisdiction; and that with such exceptions, and under such regulations, as the Congress shall make.

"It has long and very universally been deemed essential to the due administration of justice, that some national court or council should be instituted, or authorized to examine the acts of the ordinary tribunals, and ultimately to affirm or reverse their judgments and decrees; it being important that these tribunals should be confined to the limits of their respective jurisdiction, and that they should uniformly interpret and apply the law in the same sense and manner.

"The appellate jurisdiction of the Supreme Court enables it to confine inferior courts to their proper limits, to correct their involuntary errors, and, in general, to provide that justice be administered accurately, impartially, and uniformly. These controlling powers were unavoidably great and extensive, and of such a nature as to render their being combined with other judicial powers in the same persons unadvisable.

"To the natural as well as legal incompatibility of *ultimate* appellate jurisdiction with original jurisdiction, we ascribe the exclusion of the Supreme Court from the latter, except in two cases. Had it not been for this exclusion, the unalterable, ever-binding decisions of this important court would not have been secured against the influences of those predilections for individual opinions, and of those reluctances to relinquish sentiments

publicly though perhaps too hastily given, which insensibly and not unfrequently infuse into the minds of the most upright men some degree of partiality for their official and public acts.

“Without such exclusion, no court, possessing the last resort of justice, would have acquired and preserved that public confidence which is really necessary to render the wisest institutions useful. A celebrated writer justly observes, that ‘next to doing right, the great object in the administration of public justice should be to give public satisfaction.’

“Had the Constitution permitted the Supreme Court to sit in judgment, and finally to decide on the acts and errors done and committed by its own members, as judges of inferior and subordinate courts, much room would have been left for men, on certain occasions, to suspect that an unwillingness to be thought and found in the wrong had produced an improper adherence to it; or that mutual interest had generated mutual civilities and tendernesses injurious to right.

“If room had been left for such suspicions, there would have been reason to apprehend that the public confidence would diminish almost in proportion to the number of cases in which the Supreme Court might *affirm* the acts of any of its members.

“Appeals are seldom made but in doubtful cases, and in which there is, at least, much appearance of reason on both sides; in such cases, therefore, not only the losing party, but others not immediately interested, would sometimes be led to doubt whether the affirmance was entirely owing to the mere preponderance of right.

“These, we presume, were among the reasons which induced the Convention to confine the Supreme Court, and consequently its judges, to appellate jurisdiction. We say ‘consequently its judges,’ because the reasons for the one apply also to the other.

“We are aware of the distinction between a court and its judges; and are far from thinking it illegal or unconstitutional, however it may be expedient, to employ them for other purposes, provided the latter purposes be consistent and compatible with the former. But from this distinction it can not, in our opinions, be inferred

that the judges of the Supreme Court may also be judges of inferior and *subordinate* courts, and be at the same time both the *controllers* and the *controlled*.

"The application of these remarks is obvious. The circuit courts established by the act are courts inferior and subordinate to the Supreme Court. They are vested with original jurisdiction in the cases from which the Supreme Court is excluded; and to us it would appear very singular if the Constitution was capable of being so construed as to exclude the court, but yet admit the judges of the court. We, for our parts, consider the Constitution as plainly opposed to the appointment of the same persons to both offices; nor have we any doubts of their legal incompatibility.

"Bacon, in his Abridgment, says that 'offices are said to be incompatible and inconsistent, so as to be executed by one person, when, from the multiplicity of business in them, they can not be executed with care and ability; or when their being subordinate, and interfering with each other, it induces a presumption they can not be executed with impartiality and honesty; and this, my Lord Coke says, is of that importance, that if all offices, civil and ecclesiastical, etc., were only executed each by different persons, it would be for the good of the commonwealth, and advancement of justice, and preferment of deserving men. If a forester, by patent for his *life*, is made justice in eyre of the same forest, *hac vice*, the forestership is become *void*; for these offices are incompatible, because the forester is *under the correction* of the justice in eyre, and he can not *judge himself*. Upon a mandamus to restore one to the place of town-clerk, it was returned, that he was elected mayor and sworn, and, therefore, they chose another town-clerk; and the court were strong of opinion that the offices were incompatible, because of the *subordination*. A coroner made a sheriff, ceases to be a coroner; so a parson made a bishop, and a judge of the common pleas made a judge of the king's bench," etc.

Other authorities on this point might be added; but the reasons on which they rest seem to us to require little elucidation or support.

"There is in the act another deviation from the Con-

stitution, which we think it incumbent on us to mention.

"The second section of the second article of the Constitution declares, that the President shall nominate, and, by and with the advice and consent of the Senate, 'shall appoint judges of the Supreme Court, and *all* other officers of the United States whose appointments are not therein otherwise provided for.'

"The Constitution not having otherwise provided for the appointment of the judges of the inferior courts, we conceive that the appointment of some of them, namely, of the circuit courts, by an act of the legislature, is a departure from the Constitution, and an exercise of powers which constitutionally and exclusively belong to the President and Senate.

"We should proceed, sir, to take notice of certain defects in the act relative to expediency, which we think merit the consideration of the Congress. But, as these are doubtless among the objects of the late reference, made by the House of Representatives to the attorney-general, we think it most proper to forbear making any remarks on this subject at present.

"We have the honor to be, most respectfully,

"Sir, your obedient and humble servants.

"The President of the United States."¹¹

In 1801 Congress passed an act reducing the number of the Supreme Court to a Chief Justice and four associate justices after the next vacancy, and providing for the appointment of three circuit judges in each circuit, one of whom was to be considered as chief judge.¹² Under this provision the judges of the Supreme Court were relieved from holding the circuit courts, but in the following year they were expressly required to hold such courts.¹³

The constitutionality of the last act requiring the judges of the Supreme Court to hold circuit courts was questioned in the case of *Stuart v. Laird*.¹⁴

¹¹ Story on Constitution, vol. 2, 401-404.

¹² 2 United States Statutes at Large, 90.

¹³ American Law Review, vol. 10, 403. 2 United States Statutes at Large, 156.

¹⁴ 1 Cranch, 299.

Paterson, J., disposed of the question in delivering the opinion of the court as follows (pp. 308, 309): "Another reason for reversal is, that the judges of the Supreme Court have no right to sit as circuit judges, not being appointed as such or, in other words, that they ought to have distinct commissions for that purpose." To this objection, said the justice, it is sufficient to observe that practice and acquiescence under it for a period of several years, commencing with the organization of the judicial system, affords an irresistible answer and has indeed fixed the construction. It is a contemporary interpretation of the most forcible nature. This practical exposition is too strong and obstinate to be shaken or controlled. The question is at rest and ought not now to be disturbed.¹⁵

¹⁵ The following correspondence relative to what Mr. Jefferson and Mr. Madison considered should be the practice of the members of the Supreme Court in the delivery of their opinions will be of interest, although it can hardly be supposed that their suggestion could ever be reduced to a successful, practical rule. On the 27th of October, 1822, Mr. Jefferson wrote Mr. William Johnson, one of the Justices of the Supreme Court of the United States, the following observations:

"There is a subject respecting the practice of the court of which you are a member, which has long weighed on my mind, on which I have long thought I would write to you, and which I will take this opportunity of doing. It is in truth a delicate undertaking, and yet such is my opinion of your candor and devotedness to the Constitution, in its true spirit, that I am sure I shall meet your approbation in unbosoming myself to you. The subject of my uneasiness is the habitual mode of making up and delivering the opinions of the Supreme Court of the United States.

"You know that from the earliest ages of the English law from the date of the year books, at least, to the end of the 11d George, the judges of England, in all but self-evident cases, delivered their opinions seriatim, with the reasons and authorities which governed their decisions. If they sometimes consulted together and gave a general opinion, it was so rarely as not to excite either alarm or notice. Besides the light which their separate arguments threw on the subject, and the instruction communicated by their several modes of reasoning, it showed whether the judges were unanimous or divided, and gave accordingly more or less weight to the judgment as a precedent. It sometimes happened too that when there were three opinions against one, the reasoning of the one was so much the most cogent as to become afterwards the law of the land. When Lord Mansfield came to the bench he introduced the habit of caucusing opinions. The judges met at their chambers, or elsewhere, secluded from the presence of the public, and made up what was to be de-

Notwithstanding this opinion, it is matter of judicial

livered as the opinion of the court. On the retirement of Mansfield Lord Kenyon put an end to the practice, and the judges returned to that of seriatim opinions, and practice it habitually to this day, I believe. I am not acquainted with the late reports, do not possess them, and state the fact from the information of others. To come now to ourselves I know nothing of what is done in other States, but in this our great and good Mr. Pendleton was, after the revolution, placed at the head of the court of Appeals. He adored Lord Mansfield, and considered him as the greatest luminary of law that any age ever produced, and he introduced into the courts over which he presided, Mansfield's practice of making up opinions in secret and delivering them as the oracles of the court, in mass. Judge Roane, when he came to that bench, broke up the practice, refused to hatch judgments, in Conclave, or to let others deliver opinions for him. At what time the seriatim opinions ceased in the Supreme Court of the United States, I am not informed. They continued I know to the end of the 3d Dallas in 1800. Later than which I have no reports of that court. About that time the present Circuit Judge came to the bench. Whether he carried the practice of Mr. Pendleton to it, or who, or when I do not know; but I understand from others it is now the habit of the court, and I suppose it true from the cases sometimes reported in the newspapers, and others which I casually see, wherein I observe that the opinions were uniformly prepared in private. Some of these cases too have been of such importance, of such difficulty, and the decisions so grating to a portion of the public as to have merited the fullest explanation from every judge seriatim, of the reasons which had produced such convictions on his mind. It was interesting to the public to know whether these decisions were really unanimous, or might not perhaps be of four against three and consequently prevailing by the preponderance of one voice only. The judges holding their offices for life are under two responsibilities only. (1) Impeachment. (2) Individual reputation. But this practice completely withdraws them from both. For nobody knows what opinion any individual member gave in any case, nor even that he who delivers the opinion concurred in it himself. Be the opinion therefore ever so impeachable, having been done in the dark it can be proved on no one. As to the second guarantee, personal reputation, it is shielded completely. The practice is certainly convenient for the lazy, the modest and the incompetent. It saves them the trouble of developing their opinion methodically and even of making up an opinion at all. That of seriatim argument shows whether every judge has taken the trouble of understanding the case, of investigating it minutely, and of forming an opinion for himself, instead of pinning it on another's sleeve. It would certainly be right to abandon this practice in order to give to our citizens one and all, that confidence in their judges which must be so desirable to the judges themselves, and so important to the cement of the union. During the administration of General Washington, and while E. Randolph was Attorney-General, he was required by Congress to digest the judiciary laws into a single one,

history, says Judge Story, that there have been many doubts upon the question even by judges of the Supreme Court.¹⁶

Inferior Courts.—On the subject of inferior courts, Mr. Hamilton, has well said:¹⁷

“The power of constituting inferior courts, is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance. It is intended to enable the National Government to institute or *authorize* in each State or district

with such amendments as might be thought proper. He prepared a section requiring the Judges to give their opinions *seriatim*, in writing, to be recorded in a distinct volume. Other business prevented this bill from being taken up, and it passed off, but such a volume would have been the best possible book of reports, and the better, as unincumbered with the hired sophisms and perversions of counsel. Ford's Writings of Jefferson, vol. X, 222-25.

Madison agreed with Jefferson that the judges should deliver their opinions *seriatim*. In September, 1819, he wrote Judge Roane in reply to his comments on the decision in *M'Cullough* against Maryland, and said, “I could have wished, that the judges had delivered their opinions *seriatim*. The case was of such magnitude, in the scope given to it, as to call, if any case could do so, for the views of the subject separately taken by them. This might either, by the harmony of their reasoning, have produced a greater conviction in the public mind; or, by its discordance, have impaired the force of the precedent, now ostensibly supported by a unanimous and perfect concurrence in every argument and dictum in the judgment pronounced.” Madison's Writings, vol. 3, 143.

On January 15, 1823, Madison wrote Jefferson, “I am glad you have put Judge Johnson in possession of such just views of the course that ought to be pursued by the court in delivering its opinions. I have taken frequent occasions to impress the necessity of the *seriatim* mode; but the contrary practice is too deeply rooted to be changed without the injunction of a law, or some very cogent manifestation of the public discontent.” Madison's Writings, vol. 3, 292.

On the 27th of June in the same year he again wrote Jefferson, “I agree entirely with you on the subject of *seriatim* opinions by the judges, which you have placed in so strong a light in your letter to Judge Johnson, whose example, it seems, is in favor of the practice. An argument addressed to others all of whose dislikes to it are not known, may be a delicate experiment. My particular connection with Judge Todd, whom I expect to see, may tempt me to touch the subject; and, if encouraged, to present views of it which, through him, may find the way to his intimates.” Madison's writings, vol. 3, 327.

¹⁶ Story on Constitution, vol 2, 401.

¹⁷ The Federalist, No. 81.

of the United States, a tribunal competent to the determination of matters of national jurisdiction within its limits. But why, it is asked, might not the same purpose have been accomplished by the instrumentality of the State courts? This admits of different answers. Though the fitness and competency of those courts should be allowed in the utmost latitude, yet the substance of the power in question, may still be regarded as a necessary part of the plan, if it were only to empower the National Legislature to commit to them the cognizance of causes arising out of the national Constitution.

To confer the power of determining such causes upon the existing courts of the several States, would perhaps be as much 'to constitute tribunals,' as to create new courts with a like power. But ought not a more direct and explicit provision to have been made in favor of the State courts? There are, in my opinion, substantial reasons against such a provision: the most discerning can not foresee how far the prevalence of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes; whilst every man may discover that courts constituted like those of some of the States would be improper channels of the Judicial authority of the Union. State Judges holding their offices during pleasure, or from year to year, will be too little independent to be relied upon for an inflexible execution of the national laws. And if there was a necessity for confiding the original cognizance of causes arising under those laws to them there would be a correspondent necessity for leaving the door of appeal as wide as possible. In proportion to the grounds of confidence in, or distrust of, the subordinate tribunals, ought to be the facility or difficulty of appeals. And well satisfied as I am of the propriety of the appellate jurisdiction, in the several classes of causes to which it is extended by the plan of the Convention, I should consider everything calculated to give, in practice, an *unrestrained course* to appeals, as a source of public and private inconvenience.

"I am not sure but that it will be found highly expedient and useful, to divide the United States into four

or five, or half a dozen districts; and to institute a Federal Court in each district, in lieu of one in every State. The judges of these courts with the aid of the State judges may hold circuits for the trials of causes in the several parts of the respective districts. Justice through them may be administered with ease and despatch; and appeals may be safely circumscribed within a narrow compass. This plan appears to me at present the most eligible of any that could be adopted, and in order to do it, it is necessary that the power of constituting inferior courts should exist in the full extent in which it is to be found in the proposed Constitution."

In the enumeration of the powers conferred on Congress by Article 1, Section 8, Clause 9, is the power "to constitute tribunals inferior to the Supreme Court." The substantial repetition of this clause in the judiciary article seems to have been wholly unnecessary; or more properly speaking, it seems to have been wholly unnecessary to have enumerated it among the powers expressly conferred upon Congress for it rightfully belongs in the judiciary article. As it has been considered under the clause already mentioned its consideration here will be brief.¹⁸

There was not that unanimity of opinion in the Convention concerning the establishment of inferior judicial tribunals that there was concerning the establishment of the superior tribunal. Though they were expressly provided for in the resolutions of Randolph,¹⁹ and in the resolutions of the Committee of the Whole,²⁰ and those of the Convention,²¹ and the "National Legislature was empowered to appoint" such tribunals, and the report of the Committee of Detail vested the judicial power of the United States in one Supreme Court and in such inferior courts as should from time to time be constituted.²² Yet many of the members felt that such tribunals were not necessary and opposed their crea-

¹⁸ An eminent writer on American law has referred to the appearance of this provision in two places in the Constitution as "the most striking pleonasm of the Constitution." Walker's American Law, 110.

¹⁹ Journal, 62.

²⁰ Journal, 162.

²¹ Journal, 448.

²² Journal, 458.

tion, and a provision favoring the establishment of inferior courts was at one time struck out, but was restored upon the motion of Mr. Wilson and Mr. Madison, "that the National Legislature be empowered to establish inferior tribunals." They claimed there was a distinction between *establishing* such tribunals absolutely and giving the legislature a discretion to do so.²⁵

Inferior courts are those which are created by an act of Congress, the judges of which are appointed during good behavior. The circuit and district courts of the United States are of this class. Circuit courts, however, are only inferior as being subordinate to the Supreme Court and not in the technical sense of the books.²⁴

The Court of Claims and the courts of the District of Columbia are inferior courts. Courts in the territories created by Congress are not courts of the United States²⁵ within the judiciary clause of the Constitution. Neither is the district court of Porto Rico.²⁶ The judges of territorial courts are appointed for the term of four years, while judges of the Supreme and inferior courts of the United States are appointed during good behavior, and their compensation can not be diminished during their continuance in office, and these are the differences between the judges of the United States courts, and judges of the United States courts in the territories. The number of inferior courts which may be established is wholly within the power of Congress. Commissions like the interstate commerce commission and military tribunals²⁷ do not have the power of courts, and are not considered to be such.

In referring to courts and judges, the Constitution has reference to those who exercise and discharge the general powers which belong to courts in the plain, ordinary and popular sense of that term.²⁸

The only courts whose jurisdiction is unconfined by geographical boundaries are the Supreme Court and the

²⁵ Journal, 114.

²⁴ *Livingston v. Van Ingen*, 1 Paine C. C., 48.

²⁵ *Good v. Martin*, 95 U. S., 98.

²⁶ *Roman v. Todd* 206 U. S., 358.

²⁷ *In re Vidal*, 179 U. S., 127.

²⁸ *Sergeant's Const. Law*, 378.

Court of Claims. Each of these, after having acquired jurisdiction over the subject matter of a suit and the parties to it, even while sitting in Washington, can exercise its power by appropriate process, served anywhere within the limits of the territorial domain of the United States.

"It would have been competent," says Mr. Justice Miller, "for Congress to organize a judicial system analogous to that of England and of some of the States of the Union, and confer all original jurisdiction on a court or courts which should possess the judicial power with which that body thought proper, within the Constitution, to invest them, with authority to exercise that jurisdiction throughout the limits of the Federal government. This has been done with reference to the Court of Claims. It has now jurisdiction only of cases in which the United States is defendant. It is just as clearly within the power of Congress to give it exclusive jurisdiction of all actions in which the United States is plaintiff. Such an extension of its jurisdiction would include all that the statute has granted to the circuit court."²⁹

The language of this clause relating to the establishment of the Supreme Court and inferior courts is clothed with some degree of ambiguity, which might very easily have been avoided. Had the clause read, "Supreme and inferior courts, *shall* be created in which the judicial power of the United States *shall be vested*," there would have been no cause to doubt that it would have been the imperative duty of Congress to have created such courts. But the clause does not read that way, and it was a serious question at one time whether the creation of the Supreme Court was not discretionary with Congress. If it had been, the whole judicial branch of the Government would have depended upon the feeling of Congress on that subject and our whole judicial fabric might have been jeopardized. The foundation for the question is embodied in the language of the Constitution. That instrument says, "the judicial power of the United States shall be vested," etc., and it was claimed that it was not necessarily imperative upon Congress to create a Supreme

²⁹ United States v. U. P. R. R. Co., 569, 603.

Court, but left it optional with that body to do so or not, at its pleasure. This question does not seem to have been passed upon by the Supreme Court of the United States until the year 1816, more than a quarter of a century after the establishment of the Government, when it was raised in *Martin v. Hunter's lessee*.³⁰ Mr. Justice Story spoke for the court, holding that the language of the entire article was manifestly designed to be mandatory upon Congress, and that its obligatory force was so imperative that Congress could not, without a violation of its duty, have refused to carry it into operation. "If," said Justice Story (p. 330), "it was a duty of Congress to vest the judicial power of the United States, it was their duty to vest the *whole judicial power*. The language, if imperative as to one part, is imperative as to all. If it were otherwise, Congress might successively refuse to vest the jurisdiction in any one class of cases enumerated in the Constitution, and thereby defeat the jurisdiction as to all."

This part of the decision pertains to the creation of a Supreme Court and investing the judicial power in it.

There remained the other question, whether Congress could establish inferior courts and vest judicial power in them also. This was a more difficult question for determination than the other and was so recognized by Mr. Justice Story, for he said in his opinion, "Whether it will be equally obligatory to establish inferior courts, is a question of some difficulty." The difficulty came from the change in the language of the Constitution. Relative to the Supreme Court, the clause read: "The judicial power of the United States *shall be vested* in one Supreme Court," and relative to inferior courts it said, "In such inferior courts as Congress *may, from time to time ordain and establish*." Why the same language was not applied to the Supreme Court is not easily explainable. Had the clause read, "and in such inferior courts as the Congress shall from time to time ordain and establish," there could hardly have arisen a serious question about its meaning. But the change in the phraseology created a doubt to which the court

³⁰ 1 Wheaton, 304.

in *Martin v. Hunter's lessee*, gave serious consideration.

After an exhaustive review of this subject, Justice Story said (p. 331), "Congress was bound to create some inferior courts, in which to vest all that jurisdiction which under the Constitution is *exclusively* vested in the United States, and of which the Supreme Court can not take original cognizance. They might establish one or more inferior courts; they might parcel out the jurisdiction among such courts, from time to time, at their own pleasure. But the whole judicial power of the United States should be, at all times, vested either in an original or appellate form, in some courts created under its authority."

Congress has authority to establish consular tribunals competent to try persons accused of crime, in foreign countries under treaty provisions. On trial the accused must have an opportunity of examining the complaint against him and is entitled to face the witnesses and to cross-examine them, and is entitled to the benefit of counsel and to a fair trial before the consul and his associates, but it is not necessary for the constitutionality of the act that the accused should first be indicted, or that he should be tried by a petit jury.³¹

Tenure of Office.—The provision making the term of office for judges of the Supreme and inferior courts depend upon good behavior was taken from the Constitution of Massachusetts of 1780, or that of New Hampshire of 1784, where the precise language of the Constitution was used.³² Similar provisions were in some other State Constitutions. Doubtless it was inserted in these Constitutions from the English system, where it had prevailed for centuries. In the federal Convention the provision was reported favorably by the Committee of the Whole and also by the Committee of Detail, and was agreed to unanimously.³³

In the Convention Mr. Dickinson moved to insert after the words "good behavior" the words, "provided that they may be removed by the Executive on the application by the Senate and House of Representatives." Gou-

³¹ In *re Ross*, 140 U. S., 453, 470.

³² Poore's Charters, 968, 1290.

³³ Journal, 377.

verneur Morris considered it a contradiction in terms to say that the judges should hold their offices during good behavior, and yet be removable without a trial, and it was wrong to subject judges to so arbitrary an authority.

Mr. Sherman saw no objection if the plan was made part of the constitutional regulation of the judiciary department. A like provision was in the British statutes.

Mr. Wilson thought such a provision in the British Government of less danger than in the American Constitution. Chief Justice Holt had offended both branches of Parliament by his independent conduct. Had such occurred at the same time he would have been ousted. The Federal judges would be in a bad situation, if made to depend on any gust of faction which might prevail in the two branches of our Government. On a vote, the motion was lost, only Connecticut favoring it.²⁴

In an early day the tenure of office of the judges of England was wholly at the pleasure of the Crown,²⁵ but in the reign of William III, which began in 1689 and ended in 1702, it was provided by act of Parliament that the judges should not hold their offices during the pleasure of the Crown, but as long as they should conduct themselves properly, though they could be removed by the Crown on the request of both Houses of Parliament. At a later period, and during the reign of George III, which began in 1760 and ended in 1820, another statute was passed by Parliament to the effect "that the commissions of judges for the time being shall be, continue and remain in full force during good behavior, notwithstanding the demise of his Majesty (whom God long preserve) or any of his heirs or successors, any law, usage, or practice to the contrary thereof in any wise notwithstanding, provided that it may be lawful for his Majesty, his heirs and successors to remove any judge or judges upon the address of both Houses of Parliament."²⁶

²⁴ Journal, 616.

²⁵ 1 Blackstone, 267, star page.

²⁶ Statutes of George III, C 23.

Hamilton has admirably set forth the merits of this provision of the Constitution in the *Federalist*:

"As to the tenure by which the judges are to hold their places; this chiefly concerns their duration in office; the provisions for their support; the precautions for their responsibility. According to the plan of the Convention, all judges who may be appointed by the United States are to hold their offices *during good behavior*; which is conformable to the most approved of the State Constitutions and among the rest to that of this State. Its propriety having been drawn into question by the adversaries of that plan, is no light symptom of the rage for objection which disorders their imaginations and judgments.

"The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince: in a republic, it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government, to secure a steady, upright and impartial administration of the laws."

Mr. Hamilton concludes his argument in this forceful language: "Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective, if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution."²⁷

As the tenure of the Federal judges is during good behavior, it becomes important to ascertain, if possible, what good behavior is, or, in other words, what conduct in a Federal judge falls below this guaranty of his continuing in his official position.

The term "good behavior" is synonymous with good

²⁷ The *Federalist*, No. 78.

conduct. But some important questions arise out of this phrase. Must good behavior relate only to official conduct? Would a judge forfeit his right to occupy his office by want of good behavior otherwise than in his official capacity? How far, if at all, must the *motive* of the offender be considered in determining what is good behavior?

The Constitution of Louisiana provided "The clerks of the several courts of this State shall be removed for breach of good behavior." A clerk of one of the courts of that State was found guilty of a serious criminal offense. The Supreme Court of the State passing on the case, said,⁸⁸ "It is certainly true that *every* breach of good behavior does not require or even authorize the removal of a clerk.

"Every indictable offense is a breach of good behavior. As no words, however abusive, justify a battery, it follows that a clerk who would knock down a person who gave him a gross verbal abuse would be guilty of an indictable offense, and consequently of a breach of good behavior, yet no one would say such a breach would authorize his removal. The reason is that, although no man ought to be allowed in civil society to avenge his own wrongs, few men have at all times such command over their passions, as patiently to bear gross abuse until the tardy march of justice overtake the wrongdoer, and if the citizens who have no such extraordinary patience were to be excluded from office, the circle within which a choice is to be made would be alarmingly lessened. It is also clear that a breach of behavior, for which a clerk is to be removed, needs not to be a breach of official good behavior, i. e., a *misdemeanor in office*. We conclude that the expression under consideration can not be confined to *official* or *legal* misdemeanors. A gross breach of *moral* good behavior (unequivocally evincing an absolute dereliction of principles, the extinction of the moral sense or the absence of that integrity of mind, without which one can not hope to enjoy the public confidence) satisfies the words of the Constitution. We even think that an act, authorized by law, might con-

⁸⁸ State v. Ball, 7 Martin, 357 La.

stitute such misbehavior as would call for the removal of certain officers.

"In the city of New Orleans, a certain number of gaming houses are *licensed*, under an act of the State legislature. Individuals may, by the purchase of a license for this purpose at the treasury, acquire the right of keeping such a house, yet the exercise of this right could not be attended with impunity in a judge. Suitors would feel alarmed and insecure in seeing him pass from the nightly orgies of the gaming table into the very sanctuary of the justice of his country; and there can be no doubt that those whose duty it would be to calm these alarms would not long hesitate in concluding that conduct was such a breach of good behavior, as loudly demanded his removal from office."

But in *Commonwealth v. Barry*,³⁹ under a clause of the Constitution of Kentucky, providing that clerks of courts "shall be removable for breach of good behavior" (p. 229), it was held by the court of appeals that the proceeding must be confined to misconduct in office. And it was also held that it was a breach of good behavior, justifying removal, for a clerk to erase the name of a grand juror from the return of the sheriff, or to permit a bond, filed in his office, to be altered in his presence.

It was later held by the same court in *Commonwealth v. Chambers*,⁴⁰ that a clerk of a court who presented a false paper, knowing it to be such, and asking that a warrant for money issue on it made such a breach of good behavior as to justify his removal. It was also decided that the *motive* of the clerk could not be inquired into. The only question was, has a breach of good behavior in office been established? If it has been, whether from ignorance, *good* intentions, or *bad* the consequences are the same to the community. Also held, that if, the act *per se* be a breach of good behavior, the motive will not be investigated.

The Constitution of Ohio provided that "Clerks shall be removable for breach of good behavior, at any time, by the judges of the respective courts." It was shown that a clerk issued certificates of election to candidates

³⁹ Hardin's Reports, 231.

⁴⁰ 108 J. J. Marshall, 132, 128.

who had not received the largest number of votes and refused certificates to candidates who had. It was thought to have the judges remove him under this clause of the Constitution, but a majority held, "No man holding office under the Constitution of this State can be removed for an act ministerial or judicial, unless done with a corrupt or dishonest motive. Mere mistake or error of judgment is not, in the opinion of the court, a breach of good behavior, within the meaning of the Constitution, to justify an expulsion from office."⁴¹ Good behavior is "conduct authorized by law."⁴²

Can the Inferior United States Courts be Abolished?—

An important question arises under this clause. Can the judges of inferior federal courts be legislated out of office? In other words, if Congress established such a court, and a judge is duly appointed to preside over it and enter upon the discharge of his duty, can Congress repeal the act creating such court without providing for paying the judge or continuing him in office? In the early history of the republic this was done, but it created great surprise and was the subject of much adverse criticism. Judge Story said: "How this can be reconciled with the terms or the intent of the Constitution is more than any ingenuity of argument has ever, as yet, been able to demonstrate."⁴³ And Mr. Tucker was still more vehement in his criticism of such legislation. The theory of their opposition to the act was this, the Constitution provides for the creation of inferior courts; it also provides that the compensation of the judges of such courts shall not be diminished during their continuance in office, and that they shall hold their offices during good behavior. It was claimed that if Congress repeals an act providing for the creation of a judgeship, it violates these provisions. Notwithstanding the great emi-

⁴¹ State v. Roll, 1 Ohio Decision (Reprint), 284, 298.

⁴² In re Spenser, 5 Sawyer, 195, 197.

It was claimed in the argument in *Stuart v. Laird*, that the words "*during good behavior*" could not mean *during the will of Congress*. Also, that this provision was not intended to protect the judge, but was for the benefit of the people, that judges might, by the permanence of the offices, be always men of experience and learning. I Cranch, 304.

⁴³ Story on the Constitution, vol. 2, 443.

nence and legal learning of those who deny the power of Congress to pass such repealing acts, the author cannot admit that the question is settled against the power of Congress to do so, or that it should be so settled. Is there not a clear distinction here which should be observed? Does holding an office during good behavior mean that the office cannot be abolished, or that, so long as the office exists, the occupant shall hold it during his good behavior?

The Constitution says, the "judges' compensation shall not be diminished during their *continuance in office*." Does this mean that the office shall never cease to exist, that it cannot be abolished, or only that *while it continues* the compensation of the judge shall not be reduced? Does such a provision perpetuate the office, or only prevent the salary being diminished while the office is in existence? Of course, the provision does not apply to the justices of the Supreme Court. That court is beyond the power of Congress to affect. It is only inferior courts which are referred to.

Under the express terms of the Constitution, Congress is to "ordain and establish" inferior tribunals. Does not the power to establish a tribunal include the power to determine when it shall be established, and if this be conceded cannot Congress establish two inferior courts where formerly there were three? What does the expression, "In such inferior courts as the Congress may from time to time ordain and establish," mean? Does it not leave it discretionary with Congress to fix the number and location of the courts? Abolishing one inferior court and creating another cannot be held to be prohibited by the Constitution. Mr. Justice Miller, on this subject, said, "The Supreme Court cannot be abolished, nor its judges legislated out of existence, although it has been forcibly urged and probably with truth, that all the other courts can by legislative act be abolished and their powers conferred on other courts, or subdivided in different modes." Again, "The judges of the Supreme Court cannot be legislated out of office, whatever might be the result as to the other judges of the United States if the inferior courts were abol-

ished."⁴⁴ Another eminent commentator on the Constitution has said, the meaning of judicial tenure of office is for life, or until impeachment, unless, indeed, there be power to abolish circuits and districts and thus to dispense with supernumerary or objectionable incumbents.⁴⁵

The question came up for consideration in *United States v. Haynes*,⁴⁶ where it was held, "existing courts

⁴⁴ Miller on the Constitution, 340.

⁴⁵ Paschal on the Constitution, 191, note 197.

⁴⁶ 29 Federal Reporter, 696.

Rufus Choate in his speech on the judicial tenure, delivered before the Massachusetts State Convention, July 14, 1853, paid the following tribute to this clause, which is inserted here, because of its valuable historical references and its splendid tribute to this provision.

"The establishment of the tenure of good behavior was a triumph to liberty. It was a triumph of popular liberty against the crown. Before the Revolution of 1688, or certainly during the worst years of the Stuart dynasty, the judge held office at the pleasure of the King who appointed him. What was the consequence? He was the tool of the hand that made and unmade him. Scroggs and Jeffreys were but representatives and exemplifications of a system. A whole bench sometimes was packed for the enforcement of some new and more flagrant royal usurpation. Outraged and in mourning by judicial subserviency and judicial murder, England discerned at the Revolution that her liberty was incompletely recovered and imperfectly guarded, unless she had judges by whom the boast that an Englishman's house is his castle, should be elevated from a phrase to a fact; from an abstract right to a secure enjoyment, so that, although that house were 'a cottage with a thatched roof which all the winds might enter, the king could not.' To that end the Act of Settlement made the tenure of good behavior a part of the British Constitution; and a later amendment kept the judicial commission alive, as my friend for Manchester yesterday reminded us, notwithstanding the demise of the sovereign, and perfected the system. Sir, the origin of the tenure of good behavior—marking thus an epoch in the progress of liberty; a victory so to say of individuality, of private right, of the household hearth of the cottager, of the 'swink'd hedger,' over the crown,—and still more, its practical workings in the judicial character and function, may well entitle it to thoughtful treatment. Compare the series of British judges since 1688 with that before, and draw your own conclusions. Not all this improvement, in impartiality, in character, in titles to confidence and affection is due to the change of tenure; but the soundest historians of that Constitution recognize that that is one element of transcendent importance. With its introduction she began to have a government of laws and not of men.

"I come to other testimony, other opinions—the lights of a different experience. There is a certain transaction and document called the

may be abolished, and their jurisdiction and all cases Federal Constitution. Consult that. In 1787, that Convention—assisted by the thoughts and discussions of the five years of peace preceding it, upon the subject of national government—to be constructed on the republican form of polity—into which were gathered all, or almost all, of our great men, in our age of greatness; men of deep studies, ripe wisdom, illustrious reputation, a high spirit of liberty; that Convention, upon a careful survey of the institutions of the States of America, and of those of other countries, and times past and present; upon, I think we can not doubt, a profound appreciation of the true functions of a judicial department; of the qualities of a good judge; of the best system of appointment and tenure to obtain them—of the true nature of republican government—and how far, consistently with all its characteristic principles and aims, the people may well determine to appoint to office indirectly, rather than directly, and for good behavior, rather than for a limited term, when the great ends of the stability of justice, and the security of private right prescribe it—incorporated into the great organic law of the Union the principle that judges shall be appointed by the executive power, to hold their office during good behavior.* *

"I wish, sir, the time of the Convention would allow me to read entire that paper of 'The Federalist,' the seventy-eighth I believe, in which the principle of the independence of the judiciary is vindicated, and executive appointment, during good behavior, as the means of attaining such independence, is vindicated also. But read it for yourselves. Hear Hamilton and Madison and Jay; for we know from all sources that on this subject that paper expressed the opinion of all,—on the independence of the judiciary, and the means of securing it,—a vast subject adequately illustrated by the highest human intelligence and learning and purity of principle and of public life."—*Life and Writings of Rufus Choate*, vol. 2, 290-92.

The following is of interest: "In February, 1801, nineteen days before the expiration of the term of John Adams, Congress amended the judiciary act by providing for the reduction of the Supreme Court judges from six to five, and by creating sixteen circuit judges. The ostensible object was to provide for the wants of the people and to relieve the Supreme Court judges from traveling the circuits. President Adams promptly appointed sixteen leading Federalists as circuit judges. As the judges were to hold office for life, the judiciary department of the government was thus supposed to be placed above the reach of the Jeffersonian party. Jefferson swept away this new creation. The new Congress, of which his friends had control, repealed the act. The Federalists in vain exclaimed that the Constitution was violated. Their position was unsound, since the power to create inferior courts, which the Constitution conferred upon Congress, could be exercised only by enactment, and the power to enact embraced the power to repeal. Jefferson and his party feared that if a case should be brought before the Supreme Court involving the question the court would decide the repealing act to be unconstitutional. To prevent such a result Congress, in the repealing act, suspended for more than a year the sessions of the Supreme Court itself. It held no session in the year 1802. It

pending in them, whatever their condition, transferred to other existing courts, or to new courts."

Compensation of Judges.—The plans of Mr. Randolph, Mr. Pinckney and Mr. Paterson each provided that the compensation of judges should not be increased or diminished during their continuance in office, while that of Mr. Hamilton provided that they should have permanent salaries. The Committee of the Whole reported that the judges should receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution should be made, so as to affect the persons actually in office at the time of increase or diminution.⁴⁷

When this report came up for consideration in the Convention Gouverneur Morris moved to strike out "or increase," for the reason he thought the legislature ought to be at liberty to increase salaries as circumstances might require.

Franklin favored the motion. Money, he said, may not only become plentier, but the business of the department may increase, as the country becomes more populous.

Madison does not seem to have been friendly to the motion. The variations in the value of money, he said, might be guarded against by taking for a standard, wheat or some other thing of permanent value.

Morris replied, the value of money may not only alter,

was during this year that Marshall elaborated his great opinion in *Marbury v. Madison*. The office was effaced, and the judges had no duties to perform, and no appropriation was made for their salaries. They did not see how to make a case for judicial determination, and they memorialized Congress, asking that they be assigned to duty, and that Congress make provision for bringing the question of their right to the office, and to compensation, before the court. Congress refused, and this ended the matter." Landon's *Constitutional History of the United States*, 291.

Hon. Walter Clark, Chief Justice of North Carolina, in a public address delivered on April 27, 1906, said: "Every Federal judgeship below the Supreme Court can be abolished by an act of Congress, since the power which creates a Federal district or circuit can abolish it at will. If Congress can abolish one it can abolish all. Several districts have from time to time been abolished, notably two in 1801; and we know that the sixteen circuit judges created by the judiciary act of 1801 were abolished eighteen months later." *Congressional Record*, June 15, 1908, p. 8066.

⁴⁷ Journal, 162.

but the state of society may alter. In this event, the same quantity of wheat, the same value, would not be the same compensation. The amount of salaries must always be regulated by the manners and style of living in a country. Additional compensation therefore ought not to be prohibited.⁴⁸ The motion of Mr. Morris prevailed, and it is due to the efforts of that distinguished and vigilant member of the Convention that judicial salaries may be increased during the term of the beneficiary. Subsequently Mr. Madison and Mr. McHenry moved the restoration of the words "or increased," so it would read as it did before the motion of Morris was passed. After a short debate the motion was lost, only Virginia voting for it.⁴⁹

Mr. Randolph and Mr. Madison then moved to add the following to the clause as it had been adopted by the Convention, "Nor increased by any act of the Legislature which shall operate before the expiration of three years after the passing thereof." But this was also defeated, only Maryland and Virginia voting in its favor.⁵⁰

Nothing contributes more directly to the independence of the Federal judiciary than the duration of their office, and the permanence of their compensation. No judge holding practically a life position with an absolutely certain compensation need be influenced by passion, creed or party.⁵¹

⁴⁸ Journal, 377-78.

⁴⁹ Journal, 616.

⁵⁰ Journal, 616.

⁵¹ The provision that the salaries of judges might be increased during their term of office was vigorously assailed in the Virginia Convention called to consider the Constitution. Mr. Grayson, speaking of the subject, said, "Something has been said of the independency of the federal judges. I will only observe that it is on as corrupt a basis as the art of man can place it. The *salaries of the judges* may be augmented. Augmentation of salary is the only method that can be taken to corrupt a judge.

"It has been a thing desired by the people of England for many years, that the judges should be *independent*. This independency never was obtained till the second or third year of the reign of George III. It was omitted at the Revolution by inattention. Their compensation is now fixed, and they hold their offices during good behavior. But I say that our federal judges are placed in a situation as liable to corruption as they could possibly be. How are judges to be operated

Certainly no virtue is more desirable in a judge than independence. The language of John Marshall on this subject as a member of the Virginia Constitutional Convention in 1820 is most appropriate:

"The judicial department comes home in its effects to every man's fireside; it passes on his property, his reputation, his life, his all. Is it not to the last degree important that he should be rendered perfectly and completely independent, with nothing to control him but God and his conscience? I have always thought from my earliest youth till now, that the greatest scourge an angry Heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, a corrupt, or a dependent judiciary."

Hamilton has treated this subject in the *Federalist* with his accustomed ability, as follows:

"It will readily be understood that the fluctuations in the value of money, and in the state of society, rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today, might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse. A man may then be sure of the ground upon which he stands, and can never be deterred from his duty by the apprehension of being placed in a less eligible situation. The clause which has been quoted combines both advantages. The salaries of judicial officers may from time to time be altered, as occasion shall require, yet so

upon? By the hopes of reward and not the fear of diminution of compensation. *Common decency* would prevent lessening the salary of a judge. Throughout the whole page of history you will find the corruption of judges to have always arisen from that principle—the hope of reward. This is left open here. The flimsy argument brought by my friend, not as his own, but as supported by others, will not hold. It would be hoped that the judges should get too much, rather than too little, and that they should be perfectly independent. What if you give six hundred or a thousand pounds annually to a judge? It is but a trifling object when by that little money, you purchase the most invaluable blessing that any country can enjoy."

3 Elliot, 563, 564.

as never to lessen the allowance with which any particular judge comes into office, in respect to him. With regard to the judges, who, if they behave properly, will be secured in their places for life, it may well happen, especially in the early stages of the Government, that a stipend, which would be very sufficient at their first appointment, would become too small in the progress of their service.

"This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed, that together with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the Constitutions of any of the States, in regard to their own judges.

"The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for malconduct by the House of Representatives, and tried by the Senate, and if convicted, may be dismissed from office, and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own Constitution in respect to our own judges."⁵²

Jurisdiction of the Federal Courts.—The subject of the jurisdiction of the Federal judiciary underwent an extended evolution in the Convention which will be profitable and important to trace, beginning with the respective suggestions in the various plans for a Constitution, showing the changes made in such plans by the Committee of the Whole, and the changes made in the report of that committee by the Committee of Detail, and those made in the report of *that* committee by the Convention before the final completion of the Constitution.

Randolph's plan conferred jurisdiction upon the inferior tribunals "to hear and determine" in the first instance, and upon the supreme tribunal "to hear and determine in the *dernier ressort*, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other States, applying

⁵² The Federalist, No. 79.

to such jurisdictions, may be interested; or which respect the collection of the national revenue; impeachments of any national officers, and questions which may involve the national peace and harmony.”⁵³ Mr. Pinckney’s plan extended the jurisdiction of the Supreme Court to “all cases arising under the laws of the United States, or affecting ambassadors, or other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction.”⁵⁴

These suggestions were referred to the Committee of the Whole and that committee reported “that the jurisdiction of the national judiciary shall extend to all cases which respect the collection of the national revenue, impeachments of any national officers, and questions, which involve the national peace and harmony.”⁵⁵

This report made no distinction between the jurisdiction of the supreme and inferior tribunals, neither did it confer jurisdiction in particular cases upon either court.

Mr. Paterson’s plan for a Constitution, which was submitted to the Convention three days after the report of the Committee of the Whole, provided that the “supreme tribunal should have authority to hear and determine, in the first instance, all impeachments of Federal officers, and by way of appeal in the *dernier resort*, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the Federal revenue.”⁵⁶

Mr. Hamilton read his outline for a Constitution on the 18th of June, three days after Mr. Paterson had submitted his plan. It only conferred upon the Supreme Court original jurisdiction in “all cases of capture.”⁵⁷

⁵³ Journal, 63.

⁵⁴ Journal, 69.

⁵⁵ Journal, 162.

⁵⁶ Journal, 166.

⁵⁷ Journal, 186.

In the Convention there was some objection to the report of the Committee of the Whole, on the subject of the jurisdiction of the judiciary and Mr. Madison moved as a substitute for the report, that "the jurisdiction of the national judiciary shall extend to all cases arising under the national laws; and to such other questions as may involve the national peace and harmony," and this was agreed to without opposition.⁵⁸

At a later period the Convention referred all its proceedings to the Committee of Detail, at which time the provision on the subject of jurisdiction of the courts read as follows: "The jurisdiction of the national judiciary shall extend to all cases arising under laws passed by the general legislature; and to such other questions as involve the national peace and harmony."⁵⁹ This was a slight variation from the amendment offered by Mr. Madison and which the Convention had adopted.

The Committee of Detail had before it all that had been submitted to the Convention, either in the form of plans for a Constitution, or reports of committees, relating to the jurisdiction of the courts, and its report on that subject was a comprehensive outline of what became the jurisdictional section of the judiciary article. It provided, "The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting ambassadors, other public ministers, and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States; except such as shall regard territory or jurisdiction; between a State and citizens of another State; between citizens of different States, and between a State, or the citizens thereof, and foreign States, citizens or subjects."⁶⁰

This report was changed in the Convention to read as follows, and became the second clause of the judiciary article:

⁵⁸ Journal, 379.

⁵⁹ Journal, 448.

⁶⁰ Journal, 458.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State or the Citizens thereof and foreign States, Citizens or Subjects.

We will now examine in their order the various clauses of this section, to which the judicial power extends, noting in their proper places the changes made by the Convention in the report of the Committee of Detail.

First: "The judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority."

The first subject which presents itself for consideration is, what is judicial power? The Constitution does not define this expression. The framers of the Constitution seem to have assumed that its meaning was known. The phrase was first used in the report of the Committee of Detail, which read: "The judicial power of the United States shall be vested in one Supreme Court," etc., and which is now section 1, of the judiciary article in the Constitution. The term was a new one in legal and constitutional history, and it is to be regretted that the Committee of Detail has left no record as to who is its author, or how it came to be suggested and used in its report. No better phrase could have been adopted. It is brief, comprehensive and expressive.

Ordinarily, judicial power is the power conferred upon courts to duly administer the law. It is defined by Bouvier as "the authority vested in the Judges;" "the authority exercised by that department of government, which is charged with the declaration of what the law is and its construction so far as it is written law; the

power to construe and expound the law as distinguished from the legislative and executive functions."

Perhaps the fact that the term was without a precedent in the development of English constitutional law has caused some difference in the definition which has been ascribed to it.

Mr. Justice Nelson, in a charge to the grand jury in 1851, said (p. 644): "The judicial power mentioned in the Constitution, and vested in the courts, means the power conferred upon courts ordained and established by and under the Constitution, in the strict and appropriate sense of that term,—courts that compose one of the three great departments of the government."⁶¹

"Judicial power within the meaning of the Constitution may be defined to be that power by which judicial tribunals construe the Constitution, the laws enacted by Congress and the treaties made with foreign powers, or with the Indian tribes, and determines the rights of parties in conformity with such construction."⁶²

Upon this subject the observations of Mr. Justice Miller are instructive. He asks, what is judicial power? and says, "It will not do to answer that it is the power exercised by the courts, because one of the very things to be determined is what power they may exercise. It is, indeed, very difficult to find any exact definition made to hand. It is not to be found in any of the old treatises, or any of the old English authorities, or judicial decisions, for a very obvious reason. While in a general way it may be true that they had this division between legislative and judicial power, yet their legislature was, nevertheless, in the habit of exercising a very large part of the latter. The House of Lords was often the court of appeals, and Parliament was in the habit of passing bills of attainder as well as enacting convictions for treason and other crimes.

"Judicial power is, perhaps, better defined in some of the reports of our own courts than in any other place, and especially so in the Supreme Court of the United States, because it has more often been the subject of comment there, and its consideration more frequently

⁶¹ 1 Blatchford, 635.

⁶² Gilbert v. Priest, 65 Barbour, 448.

necessary to the determination of questions arising in that court than anywhere else. It is the power of a court to decide and pronounce a judgment, and carry it into effect between persons and parties who bring a case before it for decision."

Again, in speaking of the judicial department it was said (pp. 347, 348): "To this department is confided the judicial power of the Government. It is perhaps true that the lines which separate the legislative and the judicial power are sometimes not very clearly defined, but they are becoming more and more so. That is a judicial power which, in a controversy, decides the right to property between citizens or proper parties. Such a determination is not a legislative power. If a legislature, or at least such a body acting within the dominion of the Government of the United States, should undertake to declare that certain property which belonged to A should become the property of B, it would be an invasion of the judicial function, and therefore wholly inoperative and void. No court would hesitate to declare that such a determination was within the province of the courts alone; that the legislature could not effect it, because of this separation of the judicial and legislative powers which is made by the Constitution."⁶³

An eminent commentator on the Constitution has said: "Judicial power, as contradistinguished from legislative power and executive power, is the power to hear and determine all the cases of law and fact, which arise between the government and parties, or between parties, under this Constitution, the law of nations, and the laws and treaties of the United States, which shall be legally brought within the cognizance and jurisdiction of any of the courts or judicial tribunals established under the Constitution. It was intended to be a separate department of the government, possessing all the 'judicial power' of the national government except upon the single jurisdiction of impeachment. Not a power to control the other departments of the government in their official actions, but to act independently of them under the Constitution and laws."⁶⁴

⁶³ Miller on the Constitution, 313, 314, 348.

⁶⁴ Paschal on the Constitution, 194.

In *United States v. Louisiana*,⁶⁵ the court said, "As modified by the Eleventh Amendment, this clause prescribes the limits of the judicial power of the United States."

"The judicial power," said Mr. Justice Brewer, "grants the entire judicial power of the nation."⁶⁶

Judicial power means the whole power of the court, as executive power means the whole power of the executive, and as legislative power means the whole power of Congress. The Convention in using this term meant there should be no confusion of the power which the court should exercise with that which should be exercised by either of the other branches of the government.

The Constitution of Wisconsin provided, "The judicial power of this State, both as to matters of law and equity, shall be vested in one Supreme Court, circuit courts, courts of probate, and justices of the peace. The Legislature may also vest such jurisdiction as shall be deemed necessary in municipal courts, and shall have the power to establish inferior courts in the several counties with limited civil and criminal jurisdiction." "In order to determine," said the court,⁶⁷ "the meaning of the phrase, 'judicial power as to matters of law and equity,' it is only necessary to recur to the system of jurisprudence established in this country and derived from England, in which the courts had certain well defined powers in those two classes of actions. In actions at law, they had the power of determining questions of law, and were required to submit questions of fact to the jury. When the Constitution therefore vested in certain courts, judicial power in matters of law, this would be construed as vesting such power as the courts, under the English and American system of jurisprudence, had always exercised in that class of actions. It would not import that they were to decide questions of fact, because such was not the judicial power in such actions. And the Constitution does not attempt to define judicial power in these matters, but speaks of it as a thing existing and understood."

⁶⁵ 123 U. S., 35.

⁶⁶ *Kansas v. Colorado*, 206 U. S., 82.

⁶⁷ *Callanan v. Judd, et al.*, 23 Wisconsin, 349.

The term as it appears in this section was not in the report of the Committee of Detail, but was moved in the Convention by Mr. Morris, and Mr. Madison, as a substitute for the term, "jurisdiction of the Supreme Court," which was in the report of the committee. The substitution was agreed to without objection.⁶⁸

What is meant by extending the judicial power to all *cases*? What is a case in this connection and when does it arise? Chief Justice Marshall, speaking of the clause, said, "It enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form transcribed by law. It then becomes a case."⁶⁹ Other definitions of what constitutes a "case" within this clause have been given. Paschal says, "A case is a controversy between parties which has taken shape for judicial decision." Again, "A case is a suit in law, or equity, instituted according to a regular course of judicial proceedings."⁷⁰ "A case implies parties, an assertion of rights, or a wrong to be remedied."⁷¹ The term is also defined as "a question contested before a court of justice."⁷² "A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States, whenever its correct decision de-

⁶⁸ Journal, 617.

The expression "the judicial power" appears in the Constitution of the Commonwealth of Australia, adopted in 1900. That instrument provides, "The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called 'The High Court of Australia,' and in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction." The term is defined, "The judicial power of the Commonwealth is a power to declare and apply the laws of the Commonwealth." Clark's Australian Constitutional Law, 153-158.

⁶⁹ Osborn v. U. S. Bank, 9 Wheaton, 738, 819.

⁷⁰ Paschal on the Constitution, 197, note, 201.

⁷¹ Miller on the Constitution, 315.

⁷² Bouvier's Dictionary.

pend on the construction of either."⁷³ Judge Curtis defined a case, as "a subject on which the judicial power is capable of acting, and which has been submitted to it by a party—that is, one who is interested in the subject—in the forms required by law."⁷⁴

The words "case" and "cause" are synonymous in legal nomenclature and each means a proceeding in court, a suit, or action.^{74a}

In Law and Equity.—The distinction between cases in law and equity had long prevailed in England, so that when the American colonies were established and their systems of law and equity were adopted they followed the distinction which existed in England, and established courts of law and courts of equity, and this distinction prevailed in the colonies at the time of the American Revolution. When that crisis was passed and peace restored, the separation which had previously existed was continued by the States, and when the framers of the Constitution created a judicial system they also continued the distinction, so when the question of jurisdiction which should be conferred on the Federal courts was being considered, it was provided that the judicial power should extend to all cases in law and equity. This was a direct recognition by the Constitution of a difference between law and equity and that difference was observed in the act of Congress of September 24, 1789, which provided for the establishment of our judicial system, and has been observed in all subsequent legislation of Congress on the subject and has been strictly maintained by the courts. In one of the earliest cases on the subject it was said, "The remedies in the courts of the United States are to be, at common law or in equity, not according to the practice of State courts, but according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of those principles."⁷⁵

An instructive case⁷⁶ arose in the State of Texas,

⁷³ *Cohens v. Virginia*, 6 Wheaton, 379.

⁷⁴ *Curtis on Jurisdiction of U. S. Courts*, 12.

^{74a} *Blyen v. United States*, 13 Wallace, 581-595.

⁷⁵ *Robinson v. Campbell*, 3 Wheaton, 222-223.

⁷⁶ *Bennett v. Butterworth*, 11 Howard, 674-675.

where the distinction between cases at law and cases in equity had been abolished. In delivering the opinion in the Supreme Court of the United States, Taney, C. J., said, "As there is no distinction in the courts of Texas between cases at law and equity, it has been insisted that this court may regard the petition either as a declaration, or as a bill in equity." But the Chief Justice said, "The laws of Texas do not govern the proceedings of the courts of the United States and though the district court had adopted the State forms of proceeding and practice, yet such adoption should not be understood as confounding the principles of law and equity, nor as authorizing legal and equitable claims to be blended together in one suit. That the Constitution establishes the distinction between law and equity; and a party who claims a legal title must proceed at law, and in such case, may proceed according to the forms of practice in such cases in the State court. But if the claim is an equitable one, he must proceed according to the rules of this court."

The Federal courts have insisted on the observance of the distinction between proceedings at law and in equity and this distinction has been declared, defined and established, and in cases where it has been made the courts have always construed proceedings at law as applying the definitions, principles and rules of the common law to legal rights and obligations, and proceedings in equity they have construed as naming the administration of equitable as in England contradistinguished from legal rights, of the law or equity as defined and enforced by the English Courts of Chancery.⁷⁷

The same doctrine has been recognized in the later decisions of the Federal courts. In *Thompson v. Railroad Companies*,⁷⁸ this doctrine was plainly affirmed by Mr. Justice Davis, in the following language, "The Constitution of the United States and the acts of Congress, recognize and establish the distinction between law and equity. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the State courts, but ac-

⁷⁷ *Fenn v. Holmes*, 21 Howard, 481-484.

⁷⁸ 6 Wallace, 137.

according to the principles of common law and equity, as distinguished and defined in that country from which we derive our knowledge of these principles.”

“So marked is the distinction between the jurisdiction of the courts of the United States in equity and at law with respect to procedure that the blending together in one suit in a Federal court of essentially legal and equitable remedies cannot be authorized or justified by any State statute or practice on the subject.”⁷⁹ So firmly is this principle imbedded in our Federal judicial system and the difference between a proceeding at law and in equity so carefully observed, in the Federal courts, that State legislation cannot confound the principles of law and equity, or authorize the blending in one suit of legal and equitable claims, or permit an equitable defense in an action at law.⁸⁰

Mr. Justice Miller has treated this subject in the following manner: “This extension of power over all cases is, however, qualified by the words immediately following: ‘in law or in equity.’ These cases must be in law or in equity, with the exception of admiralty, as to which there is a separate clause further on in the section. Under this provision an attempt has been made to exclude a very large class of cases arising in the State and other courts, which were of an anomalous character. Some actions where remedies were given by peculiar modes of proceeding, by summary proceedings, by attachment, and others at variance with the common law, were said not to be suits at law, and yet did not come under any head of equity jurisprudence. But the decisions of the Supreme Court of the United States are abundant to the effect that, with the exception of admiralty, all modes of procedure for the assertion of rights must be arranged under the one class or the other, either law or equity, within the meaning of this clause.

“Equity is a limited jurisdiction which has grown up by the side of the common law, which is in some sense a restriction of, and departure from that law. There is not much difficulty as to what are cases in equity, and

⁷⁹ *Jones v. Mutual Fidelity Co.*, 123 F. R., 506, 518.

⁸⁰ *Anglo, etc., v. Lombard*, 132 F. R., 721, 731.

it is sufficient to say, that the Federal courts have held that all the cases that are neither properly cognizable in admiralty or equity are, within this clause of the Constitution, cases at law. Indeed, the Supreme Court have held, as they have been compelled to do, that when the Federal courts come to administer the rights or the remedies claimed under what I may venture to term the improvements in the modes of procedure which have been adopted by the codes of the various States, in most of which equity and law have been consolidated, as well as under many new statutes giving new rights, appointing new modes of procedure, and fixing new remedies, they must range the actions in those courts upon the equity or law side as the nature of the right asserted, or the remedy given may require. They do this, as equity is understood and was understood in the English courts at the time of the Revolution. Their equity jurisdiction is independent of the local law of any State, and no rules at law or in equity, which have been adopted in any State court, can abolish the separate and distinct jurisdiction. That must be administered on the chancery side of the Federal court which has taken charge of it."⁸¹

Criminal Cases Included.—The provision that the judicial power shall extend to all cases in law and equity includes criminal cases as well as civil. Such cases are equally within the domain of the judicial power of the United States, and "whatever power may be exerted over a civil case may be exerted as fully over a criminal one. A case is not merely where one party comes into court to demand something conferred upon him by the Constitution, or by a law, or a treaty, but consists of the right of one party as well as the other."⁸²

⁸¹ Miller on the Constitution, 317-319.

⁸² *Tennessee v. Davis*, 100 U. S., 257-264.

CHAPTER XLII.

THE JUDICIAL POWER, CONTINUED.

To all Cases arising under the Constitution.—The provision extending the judicial power to cases arising under the Constitution was not in the report of the Committee of Detail, but was inserted by the Convention on motion of Dr. Johnson. Madison doubted whether it was not going too far, to extend the jurisdiction of the court generally to cases arising under the Constitution, and whether it ought not to be limited to cases of a judiciary nature. "The right," said he, "of expounding the Constitution, in cases not of this nature, ought not to be given to that department." Madison's suggestion did not meet with support and the motion was agreed to without objection.¹

A case arises under the Constitution whenever its correct decision depends upon the construction of that instrument.² So whenever a benefit or right which the Constitution confers upon a person, is taken away from him, or is denied him, whatever may be its nature, then a case arises under the Constitution. Commenting upon this particular language, Mr. Justice Miller says: "A case arises under the Constitution whenever some constitutional right is denied, some right which this instrument gives, whether it be a right to property, a right of liberty, a right to vote, or any other right which can be traced to this Constitution. If that right be infringed, denied, or imperilled, it can be brought into

¹ Journal, 617.

It will readily be seen how far reaching Madison's suggestion was. It would be difficult to determine what the effect on the republic would have been had his suggestion prevailed and a provision inserted in the Constitution, limiting the jurisdiction of the court to cases of a strictly judicial character.

² *Tennessee v. Davis*, 100 U. S., 257, 284.

the courts of the United States by virtue of this provision."³

A suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his cause of action shows it to be based upon the laws or the Constitution. It is not sufficient (as the law now stands) that the defendant may find in the Constitution or the laws a ground of defense.^{3a}

To all Cases arising under the Laws of the United States.—As this clause was reported by the Committee of Detail it read, "The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States."⁴ We have seen that the term "judicial power" was substituted in this section for "jurisdiction of the Supreme Court;" so the expression, "to cases arising under the laws of the United States," was substituted for the language, "shall extend to all cases arising under laws passed by the legislature of the United States." Cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. A case arises under the laws of the United States when it arises out of the implication of the law.⁵

Chief Justice Jay, in *Chisholm v. Georgia*,⁶ said, "The judicial power of the United States" extended to five descriptions of cases, viz.: "First, To all cases arising under this Constitution; because the meaning, construction, and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. Second, to all cases arising under the laws of the *United States*; because as such laws, constitutionally made, are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the

³ Miller on the Constitution, 320.

^{3a} *In re Winn*, 213 U. S., 458-465.

⁴ Journal, 458.

⁵ 100 U. S., 264.

⁶ 2 Dallas, 475.

parties. Third, to all cases arising under treaties made by their authority; because as treaties are compacts made by, and obligatory on the whole nation, their operation ought not to be affected, or regulated by the local laws or courts of a part of the nation. Fourth, to all cases affecting ambassadors, or other public ministers, and consuls; because, as these are officers of foreign nations, whom this nation are bound to protect and treat according to the laws of nations, cases affecting them ought only to be cognizable by national authority. Fifth, to all cases of admiralty and maritime jurisdiction; because, as the seas are the joint property of nations, whose right and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction."

In *Starin v. New York*,⁷ Chief Justice Waite, in considering the question whether that suit was one which arose under the Constitution or laws of the United States, said, "The character of a case is determined by the questions involved," and laid down the following test by which such questions could be determined: "If, from the questions it appears that some title, right, privilege, or immunity, on which the recovery depends, will be defeated by one construction of the Constitution or a law of the United States, or sustained by the opposite construction, the case will be one arising under the Constitution or laws of the United States, within the meaning of that term as used in the act of 1875, otherwise not."

From this rule it would seem that in any case where a title, right, privilege or immunity, on which the right of recovery depended, would be defeated, or sustained according to the construction to be placed upon the Constitution, or laws, the case is one which arises under the Constitution or laws of the United States within the act of 1875.

Concerning this clause, Mr. Justice Miller expressed himself thus: "The Constitution itself is a very general instrument. The rights which it confers and the duties which it imposes, are stated in very general language; but these rights and duties, and the obligations growing out of

⁷ 115 U. S., 257.

them, have been put into full operation and defined and perfected by statutes, which we designate the laws of the United States. Whenever, therefore, an individual has a claim or right under a statute of the United States, which he seeks to enforce, we see that this can be done by—and that the proper place to seek the power to accomplish it is in—some one of the different branches of the judicial department of the Government of the United States.”⁸

To all Cases arising under Treaties.—The clause extending the judicial power “to treaties” was introduced by Mr. Rutledge as an amendment to the report of the Committee of Detail, and passed without objection.⁹

In considering the judicial power as extended to cases arising under a treaty we find a new element enters into the consideration. This is because of the character of a treaty. A treaty is a compact between independent and sovereign nations, and is not an agreement between parties or between corporations. Cases, therefore, which arise under a treaty contain different characteristics from those which arise out of the ordinary relations of contract.¹⁰ Every treaty, therefore, possesses a political character and the rights acquired under it are to that extent wholly independent of any rule affecting or controlling rights which can be enforced by judicial process, but are enforceable by the parties to the treaty.

“A treaty is the law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.”¹¹

But there are questions arising under the Constitution, the laws, and treaties of the United States which are political in their nature and to which the judicial power does not extend, and which are controlled by

⁸ Miller on the Constitution, 320–321.

⁹ Journal, 617.

¹⁰ Head Money Cases, 112 U. S., 580, 598.

¹¹ United States v. Rauscher, 119 U. S., 407–419.

the executive or legislative branches of the government. Paschal gives the following illustrations of these:

Where the title to property depended on the question, whether the land was within a cession by treaty to the United States, after our government, legislative and executive, had claimed jurisdiction over it, the courts must consider that question as a political one, the decision of which having been made in this manner, they must conform to it.

So the protection of the Indians in their possessions seems to be a political question.

So as to State boundaries, unless agreed to be settled, as a judicial question. And so of foreign treaties, as to confiscations. So which must be regarded as the rightful government abroad between two contending parties, is never settled by the judiciary, but is left to the general government.

The same rule has been applied in a contest as to which is the true Constitution, between two, or which possesses the true legislative power in one of our own States.¹²

To all Cases affecting Ambassadors, other Public Ministers and Consuls.—The judicial power is also extended to all cases affecting ambassadors, other public ministers and consuls. In this clause, it is applied to a different classification from the preceding ones. Previously it extended to all cases in law or equity, which arose under the Constitution, the laws of the United States, and treaties made under authority of the Constitution or laws, but now the language changes and deals with cases which affect certain public officials, whom the Constitution designates as ambassadors, other public ministers and consuls. This is the first use in the Constitution of the word "affecting," and it is important to ascertain its meaning.¹³ As it appears in this connection, it has undergone judicial consideration, but not judicial construction. It was considered in the case of *United States v. Ortega*,¹⁴ where the court stated

¹² Paschal on the Constitution, 195.

¹³ Von Holst says, this expression is vague enough to leave its interpretation quite at the discretion of the judge. *Constitutional Law of the United States*, 217.

¹⁴ 11 Wheaton, 468.

that an indictment of a private individual for an assault upon a public minister was not a case affecting such minister within the meaning of this clause; that it was a public prosecution instituted and conducted by and in the name of the United States, for the purpose of vindicating the law of nations, and of the United States, that it affected the United States and the individual making the assault, but did not affect the public minister. Under an act of Congress, which gave jurisdiction to the circuit court of all causes, civil and criminal, *affecting* persons who are denied in a State court, or who cannot enforce in that court, the rights given them by the act, the question was whether a criminal prosecution for a public offense was a cause "affecting," within the meaning of the act, persons who might be called to testify. The court—the Chief Justice and an associate Justice dissenting—held it was not, saying the only parties to such a cause were the government and the one indicted, that they alone could be reached by any judgment of the court, and witnesses, either for the prosecution or the defense were not affected by it.¹⁵ But these cases only held that the particular conduct complained of did not affect a public minister or a witness, and did not define what conduct *would affect* officials within this clause.

Judge Story says, "It seems difficult to conceive how there can be a case affecting an ambassador, in the sense of the Constitution, unless he is a party to the suit on record, or is directly affected and bound by the judgment."¹⁶ The language of the Constitution is probably broad enough to cover cases where he is not a party, but may yet be affected in interest.

The subject was discussed by Chief Justice Marshall, in his opinion in *Osborn v. Bank*.¹⁷ "If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But, suppose a suit to be brought which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The

¹⁵ *Blyen v. United States*, 13 Wallace, 581, 592, 593.

¹⁶ 2nd Story, 463.

¹⁷ 9 Wheaton, 854.

minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases 'affecting' foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to the States. Why this change? The answer is obvious. In the case of foreign ministers, it was intended, for reasons which all comprehend, to give the national courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties."

There is a general similarity in the position of ambassadors, ministers and consuls. They represent their governments in their respective positions in the countries to which they are appointed, but in another sense, their duties are wholly different. To ambassadors are committed the most delicate diplomatic affairs. At the time the Constitution was framed the highest official in the diplomatic service abroad was a minister. There were no ambassadors appointed by the United States until 1893, when the position was created and Hon. Thomas F. Bayard was appointed Ambassador to the Court of St. James. Since then other ambassadors have been appointed and there are now ten such officials representing the United States, who are accredited to the following countries: Austria-Hungary, Brazil, France, Germany, Great Britain, Italy, Japan, Mexico, Russia and Turkey. Ambassadors are the highest representatives of their country abroad, while ministers are the second highest. Consuls are the most numerous class which represent their country in foreign countries, and in rank constitute the third class of foreign representatives. Any foreign official in the United States belonging to either

of these classes is entitled to have any case which affects him, tried in a court of the United States and he cannot be deprived of such right. Such officials are the representatives of foreign governments in the United States and the Constitution most wisely and justly provides that their rights shall be determined in a tribunal which sustains sovereign relations to the nations which they represent and not in a State tribunal which can possess no sovereign relation to a foreign country. "The place of a foreign minister or consul," says Mr. Madison, "is to be viewed as created by the law of nations, to which the United States, as an independent nation, is a party, and as always open for the proper functionaries, when sent by the constituted authority of one nation and received by that of another. The Constitution, in providing for the appointment of such functionaries, presupposes this mode of intercourse as a branch of the law of nations."¹⁸

The word "minister" is defined by the Revised Statutes of the United States, to mean, "Any person invested with, and exercising the principal diplomatic functions." The word "consul" is defined by the same section to mean, "Any person invested by the United States with, and exercising the functions of consul general, vice consul general, consul, or vice consul."¹⁹

Ambassadors, public ministers and consuls are representatives of a class recognized by the law of nations. They may be designated ambassadors, envoys, ministers, commissioners, charges d'affaires, agents, or otherwise, but in substance they possess the same functions, rights and privileges as agents of their respective governments for the transaction of its diplomatic business abroad, and their designations are chiefly significant as they relate to rank, precedence, or dignity.

Consuls do not seem to be charged with the performance of diplomatic duties, unless especially so designated for some temporary purpose.²⁰ A consul, "though a public agent, is supposed to be clothed with authority

¹⁸ Madison's Writings, vol. IV, 350.

¹⁹ R. S. sec. 4130. This act was passed prior to the act creating the position of ambassador.

²⁰ In re Baig, 135 U. S., 403, 419, 423.

only for commercial purposes. He has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country; but he is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign States, or to vindicate his prerogatives. There is no doubt that his sovereign may specially entrust him with such authority; but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose dominions he assumes to exercise it."²¹

There was great propriety in extending the judicial power to these representatives of foreign sovereignties. They are in a peculiar manner the representatives of foreign governments and, as such should not be suable in the local courts of the State. As the representatives of foreign sovereigns, public ministers are subject to no laws but those of their own country; and their actions are not generally considered subject to the control of the private law of that State in which they chance officially to reside. Such ministers, in order to perform their duties to their sovereigns should be independent of every power, except that which they represent, and consequently, should not be subject to the mere municipal law of that nation in which they exercise their functions. For this reason, the rights, powers, duties and privileges of public ministers are to be determined by the law of nations and not by any municipal regulation.²²

The exemption from being sued in the State courts is not a personal one extended to foreign representatives and this clause was not inserted in the Constitution because of the personality of such representatives, but higher considerations led to its adoption. It was deemed proper that the courts of the government, should have cognizance of suits against the representatives of foreign governments.²³

To all Cases of Admiralty and Maritime Jurisdiction.—The judicial power also extends to all cases of admiralty

²¹ The Anne, 3 Wheaton, 445.

²² 2 Story, 460-461.

²³ Davis v. Packard, 7 Peters, 284.

and maritime jurisdiction.²⁴ Mr. Justice Miller said of this clause, "It is a very peculiar thing to be in the Constitution." He assigns as a reason for its being there "that it was considered to be in the nature of an international relation, coming immediately, as it does, in juxtaposition with the clause relating to ambassadors, and other public ministers and consuls. Doubtless that is why it was taken out from State jurisdiction and placed within the power of the Federal judiciary."²⁵

Mr. Hamilton seems to have entertained a different opinion concerning the clause and said, "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace."²⁶

The first judicial tribunal which the national authority created was the Court of Appeals in Cases of Capture, which had jurisdiction to try admiralty causes which were appealed to that court from the State courts. Under the ninth article of the Articles of Confederation, courts were created for the trial of piracies and felonies committed on the high seas; it was most natural, therefore, that the framers of the Constitution should confer upon the Federal courts the power to hear and determine questions of admiralty and maritime jurisdiction. Such jurisdiction is exclusive of State authority.²⁷

The admiralty court was so named from having been presided over by the Lord High Admiral of England.²⁸ The jurisdiction of such courts in the United States was formerly limited to the "ebb and flow of the tide," but in 1845,²⁹ Congress extended the jurisdiction to the Great Lakes, and the old doctrine was abrogated and the jurisdiction of admiralty courts extended to all navigable lakes and rivers of the United States without regard

²⁴ 37 Federal Reporter, 849, City of Salem.

²⁵ Miller on the Constitution, 326.

²⁶ Federalist, No. 80.

²⁷ The Glide, 167 U. S., 606, 624.

²⁸ Black's Constitutional Law, 135.

²⁹ 5 U. S. Stat., 726.

to the ebb and flow of the tides of the ocean.³⁰ The word "maritime" was inserted in the act of 1789, so as to grant the Federal courts a larger jurisdiction than that which existed in the admiralty courts of England and also to make such jurisdiction depend on the nature of the cause.³¹ As between nations, the minimum limit of the territorial jurisdiction of a nation over tide-waters is a marine league from its coast.³² Under this clause of the Constitution, the admiralty jurisdiction of the United States extends over all the navigable waters of the United States, including canals wholly within a State if they connect navigable waters, and such jurisdiction also attaches to boats used on such canals.³³ The general system of maritime law, which was familiar to the lawyers and statesmen of this country when the Constitution was adopted, is what was referred to when the Constitution extended the judicial power of the United States "to all cases of admiralty and maritime jurisdiction."³⁴ The true test of admiralty jurisdiction is only determinable by ascertaining what cases were subject to be tried in the maritime courts when the Constitution was adopted. Such cases as were reserved to the States to be governed by them, could not be taken away by the Federal government.³⁵

Extension of Judicial Power to Controversies.—This completes the enumeration of the *cases* to which the judicial power applies, but the section now extends the power to a different classification and confers jurisdiction over the subject of *controversies*. No very clear reason has been assigned why the word "cases" was discontinued and the judicial power extended to "controversies."

Mr. Tucker, an eminent commentor on the Constitution, writing as early as 1803, said: "The word *cases* in this section comprehends generally all cases, whether civil or criminal, which are capable of falling under the

³⁰ *Genesee Chief*, 12 Howard, 443, 457-458.

³¹ *Sergeant's Constitutional Law*, 193.

³² *Manchester v. Massachusetts*, 139 U. S., 240, 258.

³³ *The Robert W. Parsons*, 191 U. S., 26-29.

³⁴ *The Lattawanna*, 21 Wallace, 558, 574.

³⁵ *Peoples Ferry Co. v. Beers et al.*, 20 Howard, 393-401.

respective heads. The word *controversies* must be understood merely as relating to such as are of a *civil* nature.'⁸⁶

⁸⁶ Tucker's Blackstone, vol. 1, Appendix, 420. Rufus Choate, in his speech delivered in the Senate of the United States, on the first of May, 1842, contended, that controversies include criminal as well as civil proceedings. The following is a part of what he said on that subject:

"It would seem a pretty fair deduction from the grand general principle of policy on which I have been insisting, that the designation 'controversies between a State and foreign States, citizens or subjects,' should include criminal accusations by a State against a foreign subject, who pleads the laws of nations and the orders of his government. Civil suits by a State against aliens are triable in the national courts for the preservation of the national peace. Why should not criminal charges also between the same parties be so tried on the same policy? And if so,—unless the preceding description of 'cases arising under the Constitution, laws, and treaties of the United States' embraces and provides for them—why do they not fall under the denomination of controversies? . . . I do not concede that 'controversies' do not include criminal cases; because I would do nothing to weaken or bring into question any power of this government; and because even the hasty and inconsiderate concessions of debate may help, silently and irrecoverably, to change the Constitution. Doubtful, on the contrary, at least, it seems to me to be, whether criminal cases are not *controversies*, and were not meant to be comprehended in that term. Let me intimate the grounds of this suggestion very briefly, without pausing to attempt to enforce them. It is settled and is admitted, that the term 'cases,' in this part of the Constitution, 'all cases arising under the Constitution, laws and treaties of the United States,' includes cases of criminal as well as civil nature; but it is supposed that the term 'controversies' includes those of a civil nature only. There is, I know, an obiter dictum to this effect, of Mr. Justice Iredell, in the early and celebrated case of *Chisholm v. State of Georgia*, 2 Dall., 419. Mr. Tucker intimates the same thing in a passage of his appendix to Blackstone's Commentaries, (1 Tucker's Black. Com. App., 420, 421); and Mr. Justice Story silently records these opinions in a note, (3 Story's Com. on Constitution, 536); without any expression of assent, however, to which his name have lent an authority so commanding. Besides this I find nothing on that side of the question.

"Now, the word *controversy*, in its popular or its professional use, does not, I think, apply exclusively to civil disputes. It seems rather to have a wider and more flexible signification than the word *case*, which certainly includes criminal accusations. Judicial controversies are disputes, disagreements, differences between parties, respecting their legal rights and wrongs, wherein one controverts what the other alleges, and which are put in a form for judicial determination. These are judicial controversies. And does not an accusation of a State against a foreign subject, for an act done within its borders, which he

The act of Congress of 1789, which established the judicial system of the United States, expressly recognized this distinction, for it provided, "The Supreme Court should have exclusive jurisdiction of all *contro*

asserts an authority to do under the laws of nations and the commands of his sovereign, come exactly within the terms of the definition? Is it less truly a controversy because it relates to crime, or because one of the parties is a State and the other a man—both standing, however, on the same plane of privilege in a court of law? Let me, without indecorum, remind you that the dictionaries—in illustration of one of the meanings of the word—refer to two verses in our translation of the Bible,—a book which, more truly than Chaucer's poetry, may be called a 'well of English undefiled;' and that in one of these it denotes a legal prosecution for crime,—the parties to which are the righteous and the wicked,—and which terminates in punishment by stripes; while in the other, in a still more awful sense, the Supreme Being is declared to have 'a controversy with the nations.'

"Certain it is, I think that, if the Constitution had intended by the term *cases* to include civil and criminal proceedings, and by the term *controversies* civil proceedings only, it would have employed some qualifying and explanatory epithet or expression to convey that limitation of the sense. There is no such broad and recognized difference of signification between the words, standing alone, as to warrant the belief that the Constitution, distinguished always for its perspicuous, simple and popular phraseology, could have expected or intended that they would be understood in so fine, far-sought, and yet so momentous a diversity of signification. This would be more like and more worthy the compilers of synonyms than the framers of a fundamental law, to be read by a whole people. The judiciary act, passed in 1789, carefully says, '*controversies of a civil nature*,' where it means *civil causes*, acknowledging and feeling that the constitutional term *controversies*, standing alone, included a great deal more.

"The truth seems, in short, to be, that, in their ordinary and their professional use the words *cases* and *controversies* are coextensive, but that we employ *case* when we refer to the *subject* of the dispute, *controversies* when we refer to the parties. We speak of a painful controversy between a husband and wife and their friends, on a libel for a divorce; but we speak of a new case on the statute of frauds, or on the doctrine of presumption. And the Constitution adopts this general habit of our ordinary language in the clause which confers jurisdiction. But the very next clause, which distributes jurisdiction into original and appellate, is in these words:—'*In all cases* affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. *In all the other cases* before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.'

"And here, you observe, the word *cases* is used to include all which, in the preceding clause, had been denominated both *cases* and *controversies*.

versies of a civil nature where a State is a party," with certain exceptions.⁸⁷

Referring to this change in the language of the Constitution Mr. Justice Iredell held,⁸⁸ "The act of Congress more particularly mentions *civil* controversies, a qualification of the general word in the Constitution, which I do not doubt every reasonable man will think well warranted, for it cannot be presumed that the general word 'controversies' was intended to include any proceedings that related to criminal cases. The word 'controversy,' indeed, would not naturally justify any such construction, but nevertheless it was perhaps a proper instance of caution in Congress to guard against the possibility of it."

The meaning of the terms "cases" and "controversies" as used in this section, underwent examination by Justice Field on the circuit, where he held the term "controversies," if distinguishable at all from "cases," is so in that it is less comprehensive than the latter, and includes only suits of a civil nature. By cases and controversies are intended the claims of litigants brought before the courts for determination by such regular proceedings as are established by law or custom for the protection or enforcement of rights, or the prevention, redress or punishment of wrongs. Whenever the claim of a party under the Constitution, laws, or treaties of the United States takes such a form that the judicial

"I propound it as a doubt, therefore, whether—when you consider the ordinary import of the term itself; that it is used here without limitation or qualifications; that the word cases (with which this word certainly does not, in general speech, stand in any well-known contrast of sense), in this same clause, includes criminal and civil suits; that the same reason of policy which assigns civil controversies, to the national tribunals would, with far more urgency, assign to them criminal controversies also;—I suggest a doubt upon these considerations, whether the term does not cover the whole ground of this part of the bill. Certain it is, that, unless this description of prosecutions are within the preceding clause, 'cases arising under the Constitution, laws and treaties of the United States,' they must be holden to be controversies between a State and foreigners, and thus, quacunqve via data, cognizable in the national tribunal." *Life and Writings of Rufus Choate*, vol. 2, 35–38.

⁸⁷ U. S. Statutes at Large, vol. 1, 80.

⁸⁸ *Chisholm v. Georgia*, 2 Dallas, 431.

power is capable of acting upon it, then it has become a case. The term implies the existence of present or possible adverse parties whose contentions are submitted to the court for adjudication.³⁹

In *Fisk v. Henarie*,⁴⁰ the distinction between cases and controversies was commented upon at length. "The change," said the court, "in the language of this section from the use of the term 'cases' to 'controversies' is apparently deliberate and premeditated; and, in the case of an instrument so carefully prepared and considered as the Constitution of the United States, cannot be regarded as fortuitous, or without special significance. In my judgment, it was intended by the use of the terms 'cases and controversies' to distinguish between an ordinary action or suit, which may include many parties, plaintiff or defendant, and involve the examination and consideration of more than one item of dispute or controversy, and so much, or such part of such proceeding as may only constitute a controversy between two or more of said parties, who are citizens of different States. There may be a controversy in a case which is less than the whole of it. A controversy between citizens of different States is none the less such a controversy because they are not the only parties to it. A controversy, in the contemplation of the Constitution, is but a dispute concerning rights or wrongs cognizable by law, and which may therefore be the subject of an action or involved therein."

Chief Justice Jay, in *Chisholm v. Georgia*,⁴¹ enumerates the controversies to which the jurisdiction of the Supreme Court extends, and gives the reasons for each application of the jurisdiction, as follows: "First, to controversies to which the *United States* shall be a party; because in cases in which the whole people are interested, it would not be equal or wise to let any one State decide and measure out the justice due to others. Second, to controversies between two or more States; because domestic tranquility requires that the contentions of States should be peaceably terminated by a com-

³⁹ In *re Pacific Ry. Com'n*, 32 Fed. Rep., 241, 255.

⁴⁰ 32 Federal Reporter, 423.

⁴¹ 2 Dallas, 475.

mon judicatory; and, because, in a free country justice ought not to depend on the *will* of either of the litigants. Third, to controversies between a State and citizens of another State; because, in case a State (that is all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a national court than in a court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated, and because in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter; and true republican government requires that free and equal citizens should have free, fair and equal justice. Fourth, to controversies between citizens of the same State, claiming lands under grants of different States; because, as the rights of the two States to grant the land are drawn into question, neither of the two States ought to decide the controversy. Fifth, to controversies between a State, or the citizens thereof, and foreign States, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations, or people, ought to be ascertained by, and depend on, national authority."

Chief Justice Fuller, speaking for the court in *Stevenson v. Fain*,⁴² said, "The use of the word 'controversies,' as in contra-distinction to the word 'cases,' and the omissions of the word 'all' in respect of controversies, left it to Congress to define the controversies over which the court it was empowered to ordain and establish might exercise jurisdiction, and the manner in which it was to be done."

It will be observed that in the enumeration of controversies to which the judicial power extends, the United States, or a State, is mentioned in most of the classifications. A special reason must have existed for this in the mind of the Convention. That reason seems to be found in the history of the relations which the

⁴² 195 U. S., 165, 167.

States sustained to each other at the time the Constitution was framed. At that time controversies existed between most of the States concerning their boundaries, growing generally out of the language of their charters. Some of these controversies were of long standing and had led to bitter feelings among the citizens of the States interested. So serious had this matter become that Congress, under the Articles of Confederation, as we have elsewhere stated, organized courts and conferred upon them full authority to determine such controversies. In this view of the history of the term "controversies," a more appropriate, or more comprehensive expression could not have been employed.

To Controversies to which the United States shall be a Party.

This is the first classification of controversies to which the judicial power extends. It was not suggested in the Convention until the report of the Committee on Style was made.

It was obviously proper that there should be a tribunal in which controversies, to which the United States should be a party, could be heard. Commenting on the propriety of this provision, Hamilton said, "Controversies between the nation and its members, or citizens, can only be properly referred to the national tribunals. Any other plan would be contrary to reason, to precedent, and to decorum." Under this clause it was held in *United States v. Texas*,⁴³ that the Supreme Court has original jurisdiction in equity, in a suit where the United States has brought suit against a State for the purpose of settling a boundary line between a State and one of the territories. In delivering the opinion of the majority of the court, Mr. Justice Harlan said (p. 644): "We can not assume that the framers of the Constitution while extending the judicial power of the United States to controversies between two or more States of the Union and between a State of the Union and foreign States, intended to exempt a State altogether from suit by the General Government. They could not

⁴³ 143 U. S., 621, 644.

have overlooked the possibility that controversies, capable of judicial solution, might arise between the United States and some of the States, and that the permanence of the Union might be endangered, if to some tribunal was not entrusted the power to determine them according to the recognized principles of law. . . . It would be difficult to suggest any reason why this court should have jurisdiction to determine questions of boundary between two or more States, but not jurisdiction of controversies of like character between the United States and a State."

This classification embraces controversies where the United States is either plaintiff or defendant.⁴⁴ Whether the United States is a party to a controversy is determined by the effect of the judgment or decree which can be entered in the controversy and not by the party on the record, neither can the United States be made a party to a suit by a State without their consent, but the converse of this rule is not true, and the United States may sue a State without its permission to do so. This rule is based upon public policy.⁴⁵

To Controversies between two or more States.

This is the next classification of controversies to which the judicial power extends, and it is of great importance in our judicial system. It was the first classification of "controversies" referred to in the report of the Committee of Detail.⁴⁶ This clause was doubtless the result of controversies which had from time to time occurred between different colonies and later between different States. The word States as here used, means the States of the Federal Union and a mere political body is not authorized to bring action against a State. The party bringing the action must be a member of the Union. Hence, it was held, the Cherokee Nation of Indians could not sue in a court of the United States.⁴⁷

A State only comes within the meaning and operation

⁴⁴ *Minnesota v. Hitchcock*, 185 U. S., 373, 384, 386.

⁴⁵ *Kansas v. United States*, 204 U. S., 331, 342.

⁴⁶ *Journal*, 458.

⁴⁷ *Cherokee Nation v. Georgia*, 5 Peters, 16, 19.

of this provision when it is a party to the record as a plaintiff, or defendant, in its political capacity, and it is sufficient service of process upon a State to serve the Chief Executive and Attorney-General thereof.⁴⁸

The word "controversies," as used in this clause, has received much attention from the courts. The language does not read *all* controversies between two or more States, nor *certain* controversies, but controversies. The question most naturally arises, what controversies were meant? In *State of Rhode Island v. State of Massachusetts*⁴⁹ decided in 1838, the question came before the Supreme Court, and Mr. Justice Baldwin said (p. 721): "The Constitution does not, in terms, extend the judicial power to all controversies between two or more States, yet it in terms excludes none, whatever may be their nature or subject," and it was held (p. 752), that the Supreme Court had jurisdiction of a suit in equity in which one State sues another, to determine a question of boundary between them. In *Virginia v. West Virginia*,⁵⁰ the court went further and said (p. 55), "The established doctrine of this court is, that it has jurisdiction of questions of boundary between two States of this Union and its jurisdiction is not defeated, because in deciding that question it becomes necessary to construe agreements made between States, or because the decree which the court may render would affect the territorial limits of the political jurisdiction of the States, which are parties to the proceedings." We have already seen that the court has held, that it had jurisdiction of a suit against a State for the determination of a boundary line between such State and a territory.

⁴⁸ Paschal on the Constitution, 200.

⁴⁹ 12 Peters, 657, 721.

⁵⁰ 11 Wallace, 39.

Mr. Justice Miller pays this high eulogy to this clause:

"There never has been a tribunal known in history, anterior to the formation of this Constitution, which had jurisdiction, in the full sense of that word, of controversies between States. . . . The Constitution of the United States, however, creates a court which can not only hear and determine all controversies between different States, of which it is given original jurisdiction, but can also bring them before it by process, as it can bring the humblest citizen, and declare its judgment which it has usually been able to enforce." Miller on the Constitution, 328-30.

The fact that a State is plaintiff in an action against another State is not a conclusive test that the controversy is one in which the Supreme Court will grant relief, for the action must affect the State and not merely some of the officers or citizens thereof.

The court will not entertain a suit by a State against another State for the enforcement of an application, which, if the States were independent sovereignties, could not be enforced in the court.⁵¹ In *New Hampshire v. Louisiana*,⁵² where citizens of the State in pursuance of a statute, assigned certain obligations of the State to another State so suit could be brought for the benefit of the assignor and the State brought suit, the court refused to maintain it. In *Louisiana v. Texas*,⁵³ the court held, it was manifest from a reference to the derivation of the words "controversies between two or more States," that the framers of the Constitution intended that they should include something more than controversies over "territory or jurisdiction." "But it is apparent that the jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." Again (p. 18), "In the absence of agreement, it may be that a controversy might arise between two States for the determination of which the original jurisdiction of this court could be invoked, but there must be a direct issue between them, and the subject matter must be susceptible of judicial solution."⁵⁴ The decision concludes (p. 22): "In order that a controversy between States, justiciable in this court, can be held to exist, something more must be put forward than that the citizens of one State are injured by the maladministration of the laws of another. When there is no agreement whose breach might create it, a controversy between States does not arise unless the action complained of is State action, and acts of State officers in abuse or excess of their powers can not be laid hold of as

⁵¹ *Wisconsin v. Pelican Ins. Co.* 127 U. S., 238.

⁵² 108 U. S., 76.

⁵³ 176 U. S., 15.

⁵⁴ 176 U. S., 18.

in themselves committing one State to a distinct collision with a sister State."

Under this clause, the Supreme Court has jurisdiction to determine a suit brought by one State against another State and a sanitary district of a State to enjoin the latter from discharging the sewerage of the State into a river which runs through the plaintiff State.⁵⁵ So the jurisdiction of the court was maintained in the following case. The act of Congress admitting Louisiana into the Union gave that State certain islands, and the act admitting Mississippi into the Union gave certain islands to that State. The existence of these islands became the basis of controversy between those States, which the Supreme Court had power to hear and determine in an original suit.⁵⁶ In *Kansas v. Colorado*,⁵⁷ it was stated, "In the early drafts of the Constitution, provision was made giving to the Supreme Court jurisdiction of controversies between two or more States, except such as shall regard territory or jurisdiction, and, also, that the Senate should have exclusive power to regulate the manner of deciding disputes and controversies between the States respecting jurisdiction or territory."⁵⁸ As

⁵⁵ *Missouri v. Ills. et al.*, 200 U. S., 496-519.

⁵⁶ *Louisiana v. Mississippi*, 202 U. S., 133.

⁵⁷ 206 U. S., 46, 84.

⁵⁸ As reported by the Committee of Detail, this clause read: "To controversies between two or more States (except as shall regard territory or jurisdiction), but the words in parenthesis were omitted." *Journal*, 458.

The Committee of Detail also reported in the second section of the ninth article of its report, "In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more States, respecting jurisdiction or territory, the Senate shall possess the following powers:—Whenever the Legislature, or the Executive authority, or lawful agent of any State, in controversy with another, shall by memorial to the Senate, state the matter in question, and apply for a hearing, notice of such memorial and application shall be given, by order of the Senate to the Legislature, or the Executive authority of the other State in controversy. The Senate shall also assign a day for the appearance of the parties, by their agents before that House. The agents shall be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot agree the Senate shall name three persons out of each of the several States, and from the list of such persons, each party shall alternately strike out one, until the number shall be reduced to thirteen, and from that number not less than seven,

finally adopted, the Constitution omits all provisions for the Senate taking cognizance of disputes between the States and leaves out the exception referred to in the jurisdiction granted to the Supreme Court. That carries with it a very direct recognition of the fact that to the Supreme Court is granted jurisdiction of all controversies between the States which are justiciable in their nature."

The Judicial Power extends to Controversies between a State and Citizens of another State.

This clause was in the report of the Committee of Detail. It means that a State may sue the citizens of another State in the Federal Courts, but it can not sue its own citizens in such courts.

In *Chisholm v. Georgia*,⁵⁹ decided a few years after the government was established, it was held that under this clause a suit could be brought against a State by a

nor more than nine names, as the Senate shall direct, shall, in their presence be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy; provided a majority of the judges who shall hear the cause agree in the determination. If either party shall neglect to attend at the day assigned, without showing sufficient reasons for not attending, or being present shall refuse to strike, the Senate shall proceed to nominate three persons out of each State, and the clerk of the Senate shall strike in behalf of the party absent or refusing. If any of the parties shall refuse to submit to the authority of such court, or shall not appear to prosecute or defend their claim or cause, the court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate, and shall be lodged among the public records for the security of the parties concerned. Every commissioner shall, before he sit in judgment, take an oath to be administered by one of the judges of the Supreme or Superior Court of the State where the cause shall be tried, 'well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward.'

"All controversies concerning lands claimed under different grants of two or more States, whose jurisdictions as they respect such lands, shall have been decided or adjusted subsequently to such grants, or any of them, shall, on application to the Senate be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different States." Journal, 455, 456, 457.

⁵⁹ 2 Dallas, 419.

citizen of another State. This decision created intense feeling among the people, which amounted almost to a national alarm.⁶⁰ As a result of this feeling, the Eleventh Amendment was adopted, which rendered that part of the decision ineffectual, as we have had occasion to state elsewhere. Chief Justice Jay in *Chisholm v. Georgia*, gave the following reasons why such controversies ought to be brought in the Federal courts and consequently, why this clause was inserted in the Constitution: First, "in case a State has demands against some citizens of another State, it is better that she should prosecute their demands in the national Court than in a Court of the State to which those citizens belong, the danger of irritation and criminations arising from apprehensions and suspicions of partiality, being thereby obviated. Second, in cases where some citizens of one State have demands against all the

⁶⁰ When this clause was under consideration in the Virginia convention, Mr. Madison said:

"It is not in the power of individuals to call any State into court. The only operation it can have, is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal Court. This will give satisfaction to individuals, as it will prevent citizens, on whom a State may have a claim, being dissatisfied with the State Courts. It is a case which cannot often happen, and if it should be found improper, it will be altered." 3 Elliot, 533.

Speaking on the same clause, Marshall used this language:

"With respect to disputes between a State and the citizens of another State, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of the Federal Court. Is there no such case at present? Are there not many cases in which the legislature of Virginia is a party, and yet the state is not sued? It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable States to recover claims of individuals residing in other States. I contend this construction is warranted by the words. But, say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant, which does not prevent its being plaintiff. If this be only what cannot be avoided, why object to the system on that account? If an individual has a just claim against any particular State, is it to be presumed that, on application to its legislature, he will not obtain satisfaction? But how could a State recover any claim from a citizen of another State, without the establishment of these tribunals?" But both Madison and Marshall were in error as the case of *Chisholm* against Georgia showed. 3 Elliot 555, 556.

citizens of another State, the cause of liberty and the rights of men forbid, that the latter should be the sole Judges of the justice due to the latter; and true Republican Government requires that free and equal citizens should have free, fair, and equal justice." Mr. Justice Gray, in *Wisconsin v. Pelican Insurance Company*,⁶¹ stated that the object of vesting such jurisdiction in the Federal courts was to enable such controversies to be determined by a national tribunal so as to avoid the partiality, or suspicion of partiality which might exist, if the plaintiff State were compelled to resort to the courts of the State of which the defendants were citizens. Also, the grant of "judicial power" was not intended to "confer upon the courts of the United States the jurisdiction of a suit or prosecution by one State, of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all."

Under this clause it was held in *Georgia v. Tennessee Copper Company*,⁶² that a State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. When the States by their union made the forcible abatement of outside nuisances impossible to each, they did not thereby agree to submit to whatever might be done. They did not renounce the possibility of making reasonable demands on the ground of their still remaining *quasi* sovereign interests and the alternative to force a suit in this court. Again it was held in the same case: "There is a difference between a suit brought by a State to enjoin a corporation whose works are located in another State, from discharging noxious gases and a suit between private parties, and though the elements which would afford relief between private parties are wanting in such a case, nevertheless the State can sustain the suit for injury in its capacity as *quasi* sovereign, in which capacity it has an interest over and above its citizens in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air, and whether

⁶¹ 127 U. S., 265, 289.

⁶² 206 U. S., 237.

bringing such a suit results in more harm than good to its citizens is a question for the State itself to determine. Consequently a State may bring suit against a corporation in this court to enjoin its works from issuing noxious gases over its territory."

As under the preceding clause, so under this clause, the State must be a party in good faith—must be a party on the record—and it is not sufficient that its rights, powers, privileges, or duties come incidentally in question.⁶³ The jurisdiction of the Supreme Court can not be invoked by a State when it simply aids the prosecution of a case in its sovereign name.⁶⁴

This clause does not confer jurisdiction on any political body or community, except the State. The definition of this term was considered by Chief Justice Chase, in *Texas v. White*,⁶⁵ where he said: "In the Constitution the term state most frequently expresses the combined idea of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." The jurisdiction over controversies does not authorize the court to determine political questions.⁶⁶

To Controversies between Citizens of different States.

This provision was also in the report of the Committee of Detail. It is a most prolific source of litigation in the Federal courts. It is well settled that the object of the Convention in incorporating this clause into the Constitution was to establish a court in each State of the Union which would be free from the prejudice and local influence which is sometimes felt in the State courts, and in which citizens of another State could enforce their legal and constitutional rights.

This principle was announced in the opinion of Mr.

⁶³ Paschal on the Constitution, 200.

⁶⁴ *Kansas v. United States*, 204 U. S., 331, 341.

⁶⁵ 7 Wallace, 700, 720.

⁶⁶ *Louisiana v. Texas*, 176 U. S., 123.

Justice McLean, in *Gordon v. Longest*,⁶⁷ in the following comprehensive language: "One great object in the establishment of the courts of the United States and regulating their jurisdiction was to have a tribunal in each State, presumed to be free from local influence; and to which all who were nonresidents or aliens might resort for legal redress."

The parties to the controversy must be citizens of different States, and then the jurisdiction is complete, if the subject involved can be judicially investigated. Citizenship in different States seems to be the only qualification necessary in the parties under this clause to confer jurisdiction. It was said that "The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended."⁶⁸ The word "States" as used in this clause, means States of the Federal Union, and does not apply to citizens of a political subdivision less than a State, so that it is not sufficient under this clause to confer jurisdiction, that a party to the suit is a citizen of the District of Columbia, or of a Territory of the United States.

Citizenship and Residence.—Citizenship and residence have a different meaning under the provisions of this clause and the statutes defining and regulating the jurisdiction of the circuit courts; and averment of residence only in a particular State is not a sufficient averment of citizenship to invoke the jurisdiction of the court. A party who had for many years prior to the commencement of an action been a citizen of a State, but who had a temporary residence in another State, at the time the action was brought, without a fixed purpose to abandon citizenship in the former State, was still a citizen of such State.⁶⁹

A citizen of a State may sue a citizen of another State under this clause, whose claim is within the jurisdiction of the court. On the question of citizenship, the following facts appeared in *Shelton v. Tiffin*.⁷⁰ The defend-

⁶⁷ 16 Peters, 97, 104.

⁶⁸ *Gaines v. Fuentes et al.*, 92 U. S., 10, 18.

⁶⁹ *Steigleder v. McQuesten*, 198 U. S., 141, 143.

⁷⁰ 6 Howard, 163, 185.

ant and wife became residents of Louisiana in 1840, more than two years prior to the beginning of the action. Since living in the State they had been absent but once and that but for a short time. Most of the time since coming to the State they resided on a plantation, improving it and building a house upon it. In the winter of 1840, Shelton said he regarded himself as a resident of the State. He had never voted nor performed jury service in the State. The court on these facts held, when an individual has resided in a State for a considerable time, engaged in business, he may well be presumed to be a citizen of such State, unless the contrary appears. Upon the change of domicile from one State to another, citizenship may depend upon the intention of the individual, which can be shown more satisfactorily by acts than by declarations. The exercise of the right of suffrage is conclusive on the subject, but acquiring a right of suffrage, accompanied by acts which show a permanent location, may be sufficient. The facts proved in this case authorize the conclusion, that Shelton was a citizen of Louisiana and the court had jurisdiction. In the early case of *Gassies v. Ballou*,⁷¹ the defendant was described as "now residing in the Parish of Baton Rouge, where said Pierre Gassies caused himself to be naturalized an American citizen." The jurisdiction was questioned for want of averment of citizenship, but Chief Justice Marshall held it sufficient, saying it was equivalent to averring that defendant was a citizen of Louisiana, and adding, "A citizen of the United States, residing in any State of the Union, is a citizen of that State."

A railroad company which owns and operates a line of road through different States, and accepts and exercises powers granted by each State, and which is considered a domestic corporation for many purposes, is not a citizen of each State it runs through within the meaning of the clause.⁷²

A county is subject to be sued as a citizen in the circuit court of the United States. In passing on this question, Justice Grier said in *McCoy v. Washington*

⁷¹ 6 Peters, 761.

⁷² *St. Joseph et al. v. Steele*, 167 U. S., 659, 663.

County, "Though the metaphysical entity called a corporation may not be physically a citizen, yet the law is well settled that it may sue and be sued in the Federal courts, because it is the name under which a number of persons, corporations and citizens may sue and be sued. In deciding the question of jurisdiction, the court looks behind the name to find out who are the parties really in interest."⁷³

A State, however, is not a citizen, and a suit between a State and a citizen of another State is not a suit between citizens of different States.⁷⁴ Neither is the District of Columbia a State, nor are the Territories States within this clause of the Federal Constitution.⁷⁵

To Controversies between Citizens of the same State claiming Lands under Grants of different States.

This clause was not included in the report of the Committee of Detail, but was inserted without debate or objection, as an amendment to that report on motion of Mr. Sherman, who based it upon the ninth article of the Articles of Confederation.⁷⁶ It applies to citizens of the same State who claim lands under grants from different States. A grant of land, such as is here meant, is a conveyance by the sovereign. Hamilton said, "*These are the only instances in which the proposed Constitution directly contemplates the cognizance of disputes between citizens of the same State.*"⁷⁷

The provision was, undoubtedly, inserted to provide for a condition which the framers of the Constitution knew existed. Several of the States, about the time the Constitution was adopted, claimed titles to various tracts of land. Each of such States had made grants of parts thereof and it was to furnish a tribunal in which suits involving the title to such lands could be determined that the clause was inserted. It was held in *Pawlet v.*

⁷³ 3 Wallace C. C. 385-86.

⁷⁴ *Postal Tel. Co. v. Alabama*, 155 U. S., 482, 487; *Minnesota v. Northern Securities Co.*, 194 U. S., 48, 63.

⁷⁵ *Downs v. Bidwell*, 182 U. S., 244, 270.

⁷⁶ *Journal*, 618.

⁷⁷ *Federalist*, No. 80.

Clark⁷⁸ that the court had jurisdiction to determine a question of title claimed under grants from two States, although, at the time of the first grant, one of the grantors was a part of the other. It is the grant which passes the *legal* title to the land; and, if the controversy is founded upon the conflicting grants of different States, the judicial power of the courts of the United States extends to the case whatever may have been the *equitable* title of the parties prior to the grant.⁷⁹

To controversies between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

This is the last class of controversies to which the Constitution extends the judicial power and was the last class reported by the Committee of Detail. Its purpose was to confer jurisdiction upon the courts of the Union in cases where foreign States, or foreign citizens or subjects of a State, were parties, either plaintiff or defendant. Mr. Justice Miller says: "Every foreign State, or any of its citizens is entitled to sue any of our citizens in the Federal courts, and if a citizen of this country can get service of process upon them, he has a right to sue them in the same tribunals."⁸⁰ In *Cohens v. Virginia*,⁸¹ Marshall, C. J., in referring to this class said, "If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have the constitutional right to come into the courts of the Union."

A nominal plaintiff merely may sue for the use of an alien in the Federal court.⁸² If the plaintiff is represented as an alien, the defendant must be averred to be a citizen of the United States, in order to confer jurisdiction on the court.⁸³

It was held in *Cherokee Nation v. State of Georgia*⁸⁴ that an Indian nation or an Indian tribe within the

⁷⁸ 9 Cranch, 292.

⁷⁹ Colson et al. v. Lewis, 2 Wheaton, 377.

⁸⁰ Miller on the Constitution, 334.

⁸¹ 6 Wheaton, 378.

⁸² Browne v. Strode, 5 Cranch, 303.

⁸³ Hodgson v. Bowerbank, 5 Cranch, 303.

⁸⁴ 5 Peters, 1.

United States was not equivalent to the term "foreign State" under this clause of the Constitution. Judge Curtis says: "A foreign citizen or subject cannot sue a State, but a foreign sovereign, as for instance, the Queen of England, may bring suit against any State in the Union in the Supreme Court of the United States."⁸⁵

Having concluded our examination of the controversies to which the judicial power extends, it remains to notice in a limited manner to what bodies such power does not extend. The rule as laid down in *Martin v. Hunter* (supra) is, that Congress can invest the judicial power only in courts which it ordains and establishes. It necessarily follows that judicial power cannot be conferred upon executive or ministerial officers of the government; nor upon a clerk of a court;⁸⁶ nor upon a United States Commissioner;⁸⁷ nor upon a military commission;⁸⁸ nor upon a railway commission;⁸⁹ nor upon the interstate commerce commission;⁹⁰ nor upon a board of land commissioners.⁹¹ Commissioners cannot exercise the functions and powers of courts and consequently cannot be vested with judicial power.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Having in the preceding section defined the "cases and

⁸⁵ Curtis on Jurisdiction of Federal Courts, 18.

Judge Curtis says, he once advised a representative of the Queen (the governor-general of Canada) that such a suit might be brought to ascertain the liability of the State of New York to certain tribes of Indians settled in Canada. There were obvious reasons why the Queen, at that time, should not become a suitor in our Supreme Court, but the time may come when such a suit may be brought.

⁸⁶ *State v. Sullivan*, 50 Fed. Rep., 592, 599.

⁸⁷ *In re Sing Tuck*, 126 Fed. Rep., 397.

⁸⁸ *Ex parte Milligan*, 4 Wallace, 121.

⁸⁹ *In re Pacific Railway Commission*, 32 Fed. Rep., 241.

⁹⁰ *Com. v. C. N. O. & T. P. Ry.*, 76 Fed. Rep., 183.

⁹¹ *United States v. Ritchie*, 17 Howard, 533.

controversies" to which the judicial power extends, this section defines the original and appellate jurisdiction of the Supreme Court.

Original Jurisdiction.—By original jurisdiction is meant, that parties who are authorized to do so may bring an action in the Supreme Court without first having brought it in one of the inferior courts. This clause names the parties who may do this. They are, 1, ambassadors, 2, other public ministers, 3, consuls, and 4, a State. This limits the original jurisdiction of the Supreme Court to a very narrow field, and Mr. Justice Miller says, "This is the only place in which the word 'original' appears in the Constitution."⁹²

The Committee of Detail reported, "In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, the jurisdiction of the Supreme Court shall be original."⁹³ The Convention at first did not change the report of the committee in this respect, but the Committee on Style did. That committee declined to give the Supreme Court original jurisdiction in cases of impeachment, but agreed with the other committee in conferring original jurisdiction on that court in cases affecting ambassadors, other public ministers and consuls, and in cases in which a State shall be a party, and this is the extent of the original jurisdiction of the Supreme Court.

There was great propriety in conferring original jurisdiction upon the Supreme Court in cases affecting ambassadors, other public ministers and consuls. As we have already stated, these officers represent their respective governments and their relations to the receiving government are in their nature international. Had they been subject to the jurisdiction of State tribunals, it would, doubtless, have proven vexatious to both the sending and receiving governments and probably of great inconvenience to such officers. Mr. Hamilton, in discussing this feature, said: "The Supreme Court is to be invested with original jurisdiction only 'in cases affecting ambassadors, other public ministers and consuls, and those

⁹² Miller on the Constitution, 345.

⁹³ Journal, 458, 459.

in which a *State* shall be a party.' Public ministers of every class, are the immediate representatives of their sovereigns. All questions in which they are concerned, are so directly connected with the public peace, that as well for the preservation of this, as out of respect to the sovereignties they represent, it is both expedient and proper, that such questions should be submitted in the first instance to the highest judicatory of the nation. Though consuls have not in strictness a diplomatic character, yet as they are the public agents of the nations to which they belong, the same observation is in a great measure applicable to them. In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."⁹⁴

It was for some time a question whether the language of the Constitution conferring original jurisdiction upon the Supreme Court in all cases affecting "ambassadors, other public ministers and consuls" did not preclude Congress from conferring concurrent jurisdiction in such cases upon the circuit and district courts of the United States. In other words, it was a question whether the jurisdiction conferred upon the Supreme Court was not exclusive as well as original.

There were several expressions in the early opinions,⁹⁵ which sustain the view that the jurisdiction of the Supreme Court was exclusive, notwithstanding the outcome in *United States v. Ravara*,⁹⁶ decided on the circuit in 1793, which sustained the jurisdiction of the lower courts. The question, however, has been settled by several decisions. In *Bors v. Preston*,⁹⁷ the defendant who was representing the Kingdom of Norway and Sweden as consul at the port of New York, was sued in the circuit court of the United States for the Southern District of New York, and it was maintained in his behalf that the court did not have jurisdiction because the Constitution gave the Supreme Court original jurisdiction in such cases, but the court held that the provision as to

⁹⁴ The Federalist, No. 81.

⁹⁵ *Marbury v. Madison*, 1 Cranch, 137; *Martin v. Hunter*, 1 Wheaton, 337; *Osborn v. Bank*, 9 Wheaton, 738.

⁹⁶ 2 Dallas, 297.

⁹⁷ 111 U. S., 252, 263.

original jurisdiction in cases in which consuls were a party was not exclusive, and that the inferior courts of the United States might be given jurisdiction in such cases by Congressional action and that such jurisdiction would not be defeated in a suit between an alien and a citizen because the alien is a consul. Alienage cannot be presumed, from the fact that defendant is a consul.

In *Ames v. Kansas*, the decision in *Bors v. Preston*, was affirmed,⁹⁸ Chief Justice Waite, in his opinion saying (p. 469): "In view of the practical construction put on this provision of the Constitution by Congress at the very moment of the organization of the government, and of the significant fact that from 1789 until now no court of the United States has ever in its actual adjudications determined to the contrary, we are unable to say that it is not within the power of Congress to grant to the inferior courts of the United States jurisdiction in cases where the Supreme Court has been vested by the Constitution with original jurisdiction. It rests with the legislative department of the government to say to what extent such grant shall be made, and it may safely be assumed that nothing will ever be done to encroach upon the high privileges of those for whose protection the constitutional privilege was intended. At any rate, we are unwilling to say that the power to make the grant does not exist." This doctrine was again affirmed in *United States v. Louisiana*,⁹⁹ where it was held, "The original jurisdiction of the Supreme Court in cases where a State is a party, is not made exclusive by the Constitution, and it is competent for Congress to authorize suits by a State to be brought in the inferior courts of the United States." This establishes that it is within the power of Congress to confer upon the circuit and district courts concurrent jurisdiction with the Supreme Court in cases in which that court has original jurisdiction, except in suits between States, for it was held in *Louisiana v. Texas*,¹⁰⁰ that "by the Constitution and according to the Statute, the original jurisdiction of this court is exclusive over suits between States.

⁹⁸ *Ames v. Kansas*, 111 U. S., 449-469.

⁹⁹ 123 U. S., 36.

¹⁰⁰ 176 U. S., 16.

though not exclusive over those between a State and citizens of another State." The finality of this doctrine is that the only exclusive original jurisdiction which the Supreme Court has is in controversies between States; that in all other cases its jurisdiction is concurrent with the inferior courts.

In the first class of cases in which the Supreme Court has original and the inferior courts concurrent jurisdiction, the jurisdiction is limited to the three grades of officers named, to wit: Ambassadors, other public Ministers and Consuls.

In the second class it is limited to cases in which a State shall be a party. This classification necessarily refers to all cases mentioned in the preceding clause of the article in which a State may of right be a party plaintiff or defendant, but it does not refer to suits brought against a "State by its own citizens, or by citizens of other States, or by citizens or subjects of foreign States, even where such suits arise under the Constitution, laws and treaties of the United States, for the reason that the judicial power of the United States does not extend to suits of *individuals* against States."¹⁰¹ The original jurisdiction conferred by this clause upon the Supreme Court over controversies in which a State is a party is not affected by the question whether the State is plaintiff or defendant, and whether the United States is a party to the controversy is determined by the effect of the judgment or decree which may be rendered, and not by the merely nominal party on the record.¹⁰²

In *Cohens v. Virginia*,¹⁰³ Marshall, C. J., said: "The original jurisdiction of the Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the Federal courts; not to those cases in which an original suit might not be instituted in a Federal court. Of the last description is every case between a State and its citizens, and perhaps every case

¹⁰¹ *United States v. Texas*, 143 U. S., 621, 643, 644.

¹⁰² *Minnesota v. Hitchcock*, 185 U. S., 383, 387, 388.

¹⁰³ 6 Wheaton, 398, 399.

in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form."

As to what constitutes a case in which a "State is a party," so as to bring it within this provision of the Constitution, the original jurisdiction of the Supreme Court in the following cases has been sustained:

First. Where a bridge was built over a navigable river between two States and obstructed navigation and thereby an injury was done to one of the States for which the law afforded no adequate remedy, the Supreme Court of the United States would take original jurisdiction in a suit brought by one State against the other for relief in the matter.¹⁰⁴

Second. A State may bring a suit in the Supreme Court of the United States when the health and comfort of its people are threatened.¹⁰⁵

Third. One State may enjoin another in the Supreme Court from destroying the source of its water supply.¹⁰⁶

Fourth: A State may forbid a corporation by injunction in the Supreme Court from permitting its works to discharge noxious gases on its territory.^{106a}

In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

Unlike the preceding provision relative to the original jurisdiction of the Supreme Court, this provision is very broad and it is through this source that most of the cases find their way to the Supreme Court of the United

¹⁰⁴ *Penna. v. Wheeling Bridge Co.*, 13 Howard, 563.

¹⁰⁵ *Missouri v. Illinois & Chicago District*, 180 U. S., 208, 241.

¹⁰⁶ *Kansas v. Colorado*, 185 U. S., 125, 145.

^{106a} *Georgia v. Tennessee Copper Co.*, 206 U. S., 237.

States. Appellate jurisdiction is the power to hear and determine a cause which has been previously heard in an inferior tribunal.

In *Martin v. Hunter*,¹⁰⁷ Judge Story remarked, "The appellate jurisdiction is given by the Constitution to the Supreme Court in all cases where it has not original jurisdiction; subject, however, to such exceptions and regulations as Congress may prescribe. It is, therefore, capable of embracing every case enumerated in the Constitution, which is not exclusively to be decided by way of original jurisdiction. But the exercise of this jurisdiction is far from being limited by the terms of the Constitution to the Supreme Court. Congress can without doubt create a succession of inferior tribunals, in each of which it may vest appellate as well as original jurisdiction."

It does not come within the purview of this work to review the various congressional enactments upon this subject, but the student is referred to them as having an important bearing upon the question. In *United States v. Coe*, Chief Justice Fuller approved the language of Chief Justice Ellsworth in 3 Dallas, 321, where he said, "An appeal is a process of civil law origin and removes a cause entirely; subjecting the fact, as well as the law, to a review and re-trial; but a writ of error is a process of common law and it removes nothing for examination but the law." Also, the "judicial action of all inferior courts established by Congress may, in accordance with the Constitution, be subjected to the appellate jurisdiction of the Supreme Court."¹⁰⁸ The appellate power is conferred by the Constitution, but is regulated by Congress.¹⁰⁹

Appellate Jurisdiction of the Supreme Court over State Courts.—There is no express provision in the Constitution conferring appellate jurisdiction on the Supreme Court over the judgments of the respective State courts of final resort. If such power exists it is because it is fairly implied from some provision of the Constitution and not from any express language of that instrument. This

¹⁰⁷ 1 Wheaton, 304, 337, 338.

¹⁰⁸ 155 U. S., 76, 83-86.

¹⁰⁹ 6 Cranch, 314.

subject was most ably discussed by Mr. Hamilton,¹¹⁰ from whom the following extract is taken:

"Here another question occurs; what relation would subsist between the National and State courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution, in direct terms, gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of the Federal cognizance, in which it is not to have an original one; without a single expression to confine its operation to the inferior Federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of national concern, else the judiciary authority of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the National and State systems are to be regarded as *one whole*. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal, which is destined to unite and assimilate the principles of national justice and the rules of national decision. The evident aim of the plan of the Convention is, that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions which give appellate jurisdiction to the Supreme Court which appeals from the subordinate Federal courts, instead of allowing their extension to the State courts, would be to abridge the lati-

¹¹⁰ The Federalist, No. 82.

tude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."¹¹¹

Mr. Justice Curtis in discussing this question said: "Although the Constitution of the United States has not in terms granted to the Supreme Court appellate power, in reference to courts of the several States nevertheless such a power exists. . . . It is only an implied power, but its implication is necessary, and the reasons for it are satisfactory. Its source will be found in the second clause of the sixth article of the Constitution. This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land." This appellate jurisdiction extends both to law and fact.¹¹²

The jurisdiction which the Supreme Court has on ap-

¹¹¹ Mr. Hamilton was also of the opinion that an appeal would also lie from the *State Court* to the inferior Federal Courts and on that subject observed: "But could an appeal be made to lie from the State Court to the subordinate Federal judicatories? This is another of the questions which have been raised, and of greater difficulty than the former. The following considerations countenance the affirmative. The plan of the Convention, in the first place, authorizes the National Legislature 'to constitute tribunals inferior to the Supreme Court.' It declares in the next place, that 'the *judicial power* of the United States *shall be vested* in one Supreme Court, and in such inferior courts as Congress shall ordain and establish;' and it then proceeds to enumerate the cases, to which this judicial power shall extend. It afterwards divides the jurisdiction of the Supreme Court into original and appellate, but gives no definition to that of the subordinate courts. The only outlines described for them, are, that they be 'inferior to the Supreme Court, and that they shall not exceed the specified limits of the Federal Judiciary. Whether their authority shall be original or appellate, or both, is not declared. All this seems to be left to the discretion of the Legislature. And this being the case, I perceive at present no impediment to the establishment of an appeal from the State courts, to the subordinate national tribunals, and many advantages attending the power of doing it may be imagined. It would diminish the motives to the multiplication of Federal courts, and would admit of arrangements calculated to contract the appellate jurisdiction of the Supreme Court. The State tribunals, may then be left with a more entire charge of Federal causes; and appeals in most cases in which they may be deemed proper, instead of being carried to the Supreme Court, may be made to lie from the State courts, to district courts of the Union." The *Federalist*, No. 82.

¹¹² Curtis on Jurisdiction of U. S. Courts, 21, 27.

peal from State courts to that court came up for consideration in *Martin v. Hunter* (supra) and was thoroughly discussed by Judge Story in his great opinion in that case. Such extracts from that opinion, as are considered appropriate are inserted here. "Appellate power," said he (pp. 338-340), "is not limited by the terms of the third article to any particular courts. The words are, 'The judicial power' (which includes appellate power), 'shall extend to *all cases*,' etc., and 'in all other cases before mentioned the Supreme Court shall have appellate jurisdiction.' It is the *case*, then, and not *the court*, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. . . . If the Constitution meant to limit the appellate jurisdiction to cases pending in the courts of the United States, it would necessarily follow that the jurisdiction of these courts would, in all cases enumerated in the Constitution, be exclusive of State tribunals. How otherwise could the jurisdiction extend to *all cases* arising under the Constitution, laws, and treaties of the United States, or to *all cases* of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to *all*, but to *some*, cases. If State tribunals might exercise concurrent jurisdiction over all or some of the other classes of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive; and this not only when the *casus foederis* should arise directly, but when it should arise, incidentally, in cases pending in State courts. This construction would abridge the jurisdiction of such court far more than has been ever contemplated in any act of Congress.

"On the other hand, if, as has been contended, a discretion be vested in Congress to establish, or not to establish, inferior courts at their own pleasure, and Congress should not establish such courts, the appellate juris-

diction of the Supreme Court would have nothing to act upon, unless it could act upon cases pending in the State courts. Under such circumstances it must be held that the appellate power would extend to State courts; for the Constitution is peremptory that it shall extend to certain enumerated cases, which cases could exist in no other courts. Any other construction, upon this supposition, would involve this strange contradiction, that a discretionary power vested in Congress, and which they might rightfully omit to exercise, would defeat the absolute injunctions of the Constitution in relation to the whole appellate power."

In *Ex parte Yerger*, it was said the doctrine of the Constitution and of the cases thus far may be summed up in these propositions:

1. The original jurisdiction of this court cannot be extended by Congress to any other cases than those expressly defined by the Constitution.

2. The appellate jurisdiction of this court, conferred by the Constitution, extends to all other cases within the judicial power of the United States.

3. This appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as Congress, in the exercise of its discretion, has made or may see fit to make.

4. Congress not only has not excepted writs of *habeas corpus* and *mandamus* from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs.¹¹³

"Except in cases which affect ambassadors, other public ministers, and consuls and those where a State is a party—in which cases the jurisdiction of the Supreme Court is original—that court can exercise appellate jurisdiction, both as to law and fact, subject to such exceptions and regulations as Congress may make in the other cases to which the judicial power of the United States extends. What such exceptions and regulations shall be is for Congress to determine, having due regard to the provisions of the Constitution. If a court of original jurisdiction errs in quashing, setting aside or dismissing

¹¹³ 8 Wallace, 98.

an indictment for an alleged offense against the United States upon the ground of the unconstitutionality of the statute under which the indictment is brought, or that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced except by review in the Supreme Court.'"¹¹⁴

¹¹⁴ United States v. Bitty, 208 U. S., 393-399.

CHAPTER XLIII.

THE JUDICIAL POWER, CONTINUED.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State the Trial shall be at such Place or Places as the Congress may by Law have directed.

The first part of this clause is similar to the provision in Mr. Pinckney's plan,¹ which was the only provision in any of the plans for a Constitution relative to the trial of offenders, and which was as follows: "All criminal offences, except in cases of impeachment, shall be tried in the State where they shall be committed. The trials shall be open and public, and shall be by jury."²

The original Constitution did not provide for trial by jury in civil cases.

The Committee of Detail reported on the subject: "The trial of all criminal offences (except in cases of impeachment) shall be in the State where they shall be committed; and shall be by jury."³

In the Convention this report was amended without objection to read: "The trial of all crimes (except in cases of impeachment) shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, then the trial shall be at such place or places as the Legislature may direct." Mr. Madison says, "The object of this amendment was to provide for trial by jury of offences committed out of a State."⁴

¹ In Mr. Pinckney's plan of a Constitution, as given in Moore's *American Eloquence*, Page 369, he favored a trial by jury in all cases, criminal as well as civil.

² Journal, 70.

³ Journal, 459.

⁴ Journal, 619.

With the change of a word or two this is the provision as found in this clause.

The term "trial" is of very ancient origin, and its history runs through many centuries. The *right* to trial existed long before the period when a party was entitled to a *trial by jury*, and this is true both as to civil and criminal cases.⁵

It is not the purpose of this work to trace minutely or even generally, the history of trial in criminal cases, but only to take such a cursory glance at this important term in its association with the development of English Criminal Law, as will enable its true import and meaning as found in the Constitution to be understood.

Trial by Compurgation.—Far back in the history of civilization under the old Saxon Kings, if a person was accused of crime and made oath that he was innocent he was allowed to produce a number of persons who knew him and who would assert their belief in his innocence. If he produced a sufficient number he would be allowed his freedom, provided more were not produced against him. This was known as trial by compurgation. Compurgators were neighbors of the accused who testified that they believed what he swore was the truth. The number of compurgators was indefinite, but twelve were frequently called. On such trial the oath taken by the accused was: "By the Lord, I am guiltless both in deed and counsel of the charge of which _____ accuses me." And the oath taken by the compurgators was, "By the Lord, the oath is clear and unperjured which _____ has sworn."⁶

This method was somewhat similar to the modern proceeding of offering testimony concerning the good character of a witness, as the compurgators did not swear

⁵ The following note is instructive. "I use the word 'trial,' because it is the word in common use during recent centuries. But as applied to the old Law, this word is an anachronism. The old phrases were probatio, purgatio, defensio; seldom, if ever, in the earlier period, triatio. In those days people 'tried' their own issues; and even after the jury came in, e. g., in the early part of the thirteenth century, one is sometimes said to clear himself (purgare se) by a jury; just as a man used to be said in our colonies to 'clear himself' and 'acquit himself' by his own oath as against some accusations and testimony of an Indian." Thayer's Common Law Evidence, 16, note.

⁶ Forsythe History of Jury Trial, 75.

to any fact in the case, but only that the oath of the accused was true.

Trial by Ordeal.—Trial by ordeal was one of the most ancient methods of proceeding against a person accused of crime—being older, perhaps, than trial by compurgation. It generally was divided into Ordeal by Fire, or Ordeal by Water, but it also included other Ordeals.

A brief but comprehensive history of Trial by Ordeal is given by Thayer.⁷

⁷ Patetta, *Ordealie*, C. 1. See *Inst. of Narada*, Jolly's *Trans.* 44-54. This book is attributed to some period between the second and ninth centuries before Christ; "but the materials of our work," says the translator (p. xx), "are, of course, much older, and many of the laws it contains belong to the remotest antiquity." Beginning at Part 1, chapter 5, s. 102, and ending at Part 2 (pp. 44-54), we have the doctrine of ordeals. After speaking of the situation where there are neither writings nor witnesses, and of the examination of the defendant, it is said that "If reasonable inference also leads to no result," the defendant is to be put to ordeal. "He whom the blazing fire burns not, whom the water soon forces not up, or who meets with no speedy misfortune must be held veracious in his testimony on oath. Let ordeals be administered if an offense has been committed in a solitary forest, at night, in the interior of a house, and in cases of violence and of denial of a deposit. . . . The balance, fire, water, poison, and sacred libation are said to be the five divine tests for the purgation of suspected persons." Then follows an account of each of these ordeals. 1. After describing the scales and the first weighing of the accused, it is said, "And having adjured the balance by imprecations, the judge should cause the person accused to be placed in the balance again. 'O balance, thou only knowest what mortals do not comprehend. This man being arraigned in a cause is weighed upon thee. Therefore, mayest thou deliver him lawfully from his perplexity.' . . . Should the individual increase in weight, he is not innocent; if he be equal in weight or lighter, his innocence is established." 2. In the ordeal of fire, seven circles with a diameter equal to the length of the man's foot, and thirty-two inches distant from each other, are marked on the ground. The circles are smeared with cows' dung and the man, having fasted and made himself clean, has seven *accattha* leaves laid on his hands and fastened there, and takes in his hands a smooth ball of red-hot iron, weighing fifty *palas*, and walks slowly through the seven circles. He then puts the ball on the ground. "If he is burnt, his guilt is proved; but if he remains wholly unburnt, he is undoubtedly innocent. . . . 'Thou, O fire, dwellest in the interior of all creatures, like a witness. Thou only knowest what mortals do not comprehend. This man is arraigned in a cause and desires acquittal. Therefore mayest thou deliver him lawfully from his perplexity.'" 3. In the ordeal of water, the man wades out into the water up to his navel, and another shoots an arrow. The man dives or ducks into the water, and if he remains wholly under while a swift runner gets and fetches

Trial by Ordeal was abandoned about 1215 A. D. It was founded upon the idea of the supernatural: that the innocent would be protected by Providence and be enabled to endure great suffering. These ordeals were called *Judicia Dei*—the judgment of God.⁸

Trial by Battle or Duel.—Another form of trying an accused person was by battle or duel. It was introduced into England by William the Conqueror, and the earliest case said to have been tried in this manner was in 1074. Incomprehensible as it may seem to the student of constitutional law and modern jurisprudence, this ancient and unreasonable method of determining the guilt or innocence of an accused person prevailed in England till as late as the year 1819, "and then," says an accomplished writer, "came the abolition of a long-lived relic of barbarism, which had survived in England when all the rest of Christendom had abandoned it."⁹

Other forms of trial existed in criminal cases before the introduction of the jury system, but these were the most frequent and important. They grew largely out of the superstition of the Dark Ages, when it was believed that miraculous interventions could be made to save those who were innocent. In the reign of Henry

back the arrow he is innocent. The adjuration to the water is similar to the above, in the case of fire and the balance. 4. In the ordeal by poison elaborate directions are given about the choice of the poison and the time of year for administering it. The invocation runs: "Thou, O poison, art the son of Brahma, thou art persistent in truth and justice, relieve this man from sin, and by thy virtue become an ambrosia to him. On account of thy venomous and dangerous nature thou art the destruction of all living creatures; thou art destined to show the difference between right and wrong like a witness," etc., etc., much as in the other cases above. "If the poison is digested easily, without violent symptoms, the king shall recognize him as innocent, and dismiss him, after having honored him with presents." 5. In the ordeal by sacred libation, "the judge should give the accused water in which an image of that deity to whom he is devoted has been bathed, thrice calling out the charge with composure. One to whom any calamity or misfortune happens within a week or a fortnight is proved to be guilty." Sir Henry Maine, writing in 1880 (*Life and Speeches*, 426) after saying that "perjury and corruption are still deplorably common in India," adds: "ordeals are perpetually resorted to in private life." Thayer's *Common Law Evidence*, 35-36.

⁸ Longman's *Lectures on English History*, 129, 130.

⁹ Thayer's *Common Law Evidence*, 45.

II, beginning 1154 and ending 1189, the privilege, as it was considered, of being tried by twelve sworn knights was extended to criminals for offences relating to landed property if they paid the King a sufficient sum of money.¹⁰

We have traced the history of trial in criminal cases to the year 1215, when Magna Charta was granted by King John. In this great instrument, the "right of trial" was assured to every one accused of crime and from it the permanent date of "trial" in English law may be reckoned, for from that time the trial became a fixed part of the procedure in criminal jurisprudence, and the system has endured through the intervening centuries.

The word "trial" as used in this clause means a trial as it existed under the common law of England at the time the Constitution was adopted. Provision for jury trials of offences committed in a State existed in the Constitutions of all American States at the time the Federal Convention met and the adoption of this clause consumed but little of the Convention's time, so unanimous were the members in their opinion that the provision should be inserted in the Constitution.

A "trial" is an examination according to law, before a duly constituted tribunal, of the facts in the issue of a case.

The clause under consideration applies to trials in the Federal courts throughout the United States and in the District of Columbia,¹¹ and in the Territories of the United States.¹² But it does not apply to State courts¹³ nor to a trial by a military commission organized during a war when the courts are accessible;¹⁴ nor to a proceeding in contempt.¹⁵ Nor is a person who violates an injunction entitled to a jury trial. Before the courts of the United States can try a person for the commission of a crime, Congress must have declared the offence complained of to have been a crime. In *United States v.*

¹⁰ Longman's Lectures on English History, 130.

¹¹ *Callan v. Wilson*, 127 U. S., 540, 550.

¹² *Thompson v. Utah*, 170 U. S., 343, 347.

¹³ *Eilenbecker v. Plymouth Colony*, 134 U. S., 31, 35.

¹⁴ *Ex parte Milligan*, 4 Wallace, 3.

¹⁵ *In re Debs*, 158 U. S., 564, 595.

Hudson,¹⁶ Marshall, C. J., said: "The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction over the offence." Following this opinion, Justice McLean in *United States v. Lancaster*¹⁷ held, "The Federal Government can exercise no criminal jurisdiction which is not given by the statute, nor punish any act, criminally except as the statute provides."

The word "crime" is susceptible of two meanings. In its broadest meaning, said Mr. Justice Harlan in *Callan v. Wilson*,¹⁸ it embraces every violation of the public law, but in its narrower sense it only includes offences of a serious or atrocious character. It is to be considered in the light of the principles which, at common law, determined whether the accused was entitled to a trial by jury, and is not to be construed as relating only to felonies, or offences which are punished by imprisonment in the penitentiary, but also includes some classes of misdemeanors, the punishment of which may involve the deprivation of the liberty of a citizen. It would be a narrow construction of the Constitution to hold that no prosecution for a misdemeanor is a prosecution for a "crime," within the meaning of this clause.

But petty offences do not come within the meaning of the term "crimes" so as to justify a trial by jury where one is accused of such an offence.¹⁹

We have shown that the Committee of Detail reported "the trial of all criminal offences," etc., but that the Convention omitted the word "offences" and substituted "crimes." The term "offense" means generally the same as misdemeanor; the difference being that a "misdemeanor" is indictable, while an "offense" is not, the punishment being summary by forfeiting the penalty.²⁰

Blackstone's Commentaries on the Laws of England were published a few years before the meeting of the Convention which framed the Federal Constitution, and it is fair to assume that that great work had been ex-

¹⁶ 7 Cranch, 34.

¹⁷ 2 McLean, 431, 433.

¹⁸ 127 U. S., 549.

¹⁹ *Schrick v. U. S.*, 195 U. S., 65, 70; *Dow v. U. S.*, 138.

²⁰ *Bouvier*.

tensively read by the men who were members of that Convention and by other leading men of the times. Blackstone defines the word "crime" thus: "A crime or misdemeanor is an act committed, or omitted, in violation of a public law either forbidding it or commanding it." This general definition comprehends both crimes and misdemeanors, which, properly speaking, are mere synonymous terms; though, in common usage, the word "crimes" is made to denote such offences as are of a deeper and more atrocious dye; while smaller faults, and omissions of less consequence, are confined under the gentler name of "misdemeanors," only.²¹

Paschal seems to think the word "crime," as used in this clause, includes misdemeanors.²² Commenting on the substitution of the word "crimes" for the word "offences," as reported to the Convention by the Committee of Detail, Mr. Justice Gray, in *Schrick v. United States*,²³ said, "The significance of this change cannot be misunderstood. If the language had remained 'criminal offences,' it might have been contended that it meant all offences of a criminal nature; petty as well as serious, but when the change was made from 'criminal offences' to 'crimes,' and made in the light of the popular understanding of the meaning of the word 'crimes,' as stated by Blackstone, it is obvious that the intent was to exclude from the constitutional requirement of the jury the trial of petty criminal offences."

The Trial of all Crimes except in Cases of Impeachment, shall be by Jury.

This mandatory language excludes every other kind of trial, and guarantees to everyone accused of crime a jury trial.

Origin of Jury Trial.—In the brief history we have given of the word "trial," we have seen that its origin is vague and indefinite, and, as it has been understood for centuries, is an evolution of older forms and methods of settling disputes and controversies.

²¹ Blackstone, vol. 4, 2.

²² Paschal on the Constitution, 209.

²³ 195 U. S., 70.

But vague and indefinite as the history of this term is, it does not seem more enshrouded in the mystery and silence of past ages than is the word "jury." The origin of this term is wholly incapable of being fixed with any degree of certainty. The historians and scholars who have studied the term and traced its source into the ages of the past are quite unable to agree concerning it. One writer says that the best theory regards the jury as having been derived from Normandy; that it made its appearance in England soon after the Norman Conquest, and first appeared in the statute law of England between 1154 and 1189 in the reign of Henry II.²⁴

Another writer states that the "jury" originated with the Frankish inquisition; that it existed in Normandy and then found its way to England some time in the eleventh century.²⁵ While still another historian, though unable to fix the date when the jury system in criminal cases was first established, says it was in operation during the reign of Henry III, when Bracton wrote, being from 1216 to 1272.²⁶ But a fourth historian tells us that the great King Alfred, whose reign began in 871 and ended in 901, caused Cadwine, one of his judges, to be hanged, because he condemned a man to death without the consent of the whole jury, and that he executed Freberne for sentencing one Harpin to suffer death when the jury was undecided in its verdict as to his guilt, for when there was a doubt, Alfred thought it best to save the accused.²⁷ May not this be taken to be the origin of that principle of criminal law, that all reasonable doubts are to be resolved in favor of the accused? It was not until the granting of Magna Charta that the jury system became apparent in the administration of the criminal law in England. But from that time it has been distinctly recognized, though many important improvements have been made in it. It was two hundred years after the granting of the great charter before witnesses were allowed to appear before juries in a trial. The great

²⁴ 10 Harvard Law Review, 150-160.

²⁵ 5 Harvard Law Review, 249-273.

²⁶ Forsythe on Jury Trials, 200.

²⁷ Miller's History of the Anglo-Saxons, 197.

principles secured by the Barons from John so far as trial by jury was concerned were: The separation of the judge and the jury; and the finding of the guilt or innocence of the accused by a verdict of a jury made up of his equals.²⁸

Improvements in the jury system were made during the Middle Ages and it had been for many centuries similar to what it was when our Constitution was written.

Many definitions have been given of the term "jury," but each uses the same general language. Mr. Justice Gray in the case of *Capital Traction Co. v. Hof*,²⁹ after citing many definitions of the term gave the following: "Trial by jury, in the primary and usual sense of the term, is not merely a trial by jury of twelve men before an officer vested with authority to cause them to be summoned and empaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on the acquittal of a criminal charge) to set aside their verdict if, in his opinion it is against the law or evidence." And he adds, "This proposition has been so generally admitted, and so seldom contested that there has been little occasion for its distinct assertion."

In a very early day there was no fixed number of jurors. Sometimes it was 66, 41, 20, 17, 13, 11, 8, 7, 53, 15, etc. This was under the Frankish Empire and the number also greatly varied under the Norman rule, but usually it was twelve.³⁰

Why twelve was selected as the regular number to constitute a jury the following instructive account cited by Thayer will show: "And first as to their (the jury's) number twelve; and this number is no less esteemed by our law than by Holy Writ. If the twelve Apostles on their twelve thrones must try us in our eternal state,

²⁸ Longman's Lectures on English History, 131.

²⁹ 174 U. S., 13.

³⁰ Thayer's Common Law Evidence, 85.

good reason hath the law to appoint the number of twelve to try our temporal. The tribes of Israel were twelve, the patriarchs were twelve, and Solomon's officers were twelve. (I Kings, iv. 7.) Therefore, not only matters of fact were tried by twelve, but of ancient times twelve judges were to try matters in law, in the Exchequer Chamber, and there were twelve counselors of state for matters of state; and he that wageth his law must have eleven others with him who believe he says true. And the law is so precise in this number twelve, that if the trial be by more or less, it is a mistrial."³¹

Unanimous Verdict.—The doctrine that the verdict of the jury must be unanimous did not prevail until the latter part of the fourteenth century,³² and jurors at a very early period were also witnesses, and were called to act as such because of their knowledge of the facts, hence the rule of qualification has wholly changed.

Challenge of Jury.—The right to challenge a juror prevailed as early as the first part of the thirteenth century and at that time, a defendant, when the jurors came into court, might challenge them in this form: Sir, this man ought not to be upon the jury, because he indicted me, and I presume of him and all those who indicted me, that they still bear the same ill-will against me as when they indicted me.³³ And this challenge was sustained. This is similar to challenging a man at the present time from a trial jury because he had served on the grand jury which found the indictment.

The reference we have already made to the Journal of the Constitutional Convention shows that the whole of this clause after the word "jury" was added to the report of the Committee of Detail by the Convention³⁴ and was then adopted without objection.

Such Trial shall be held in the State where the said Crimes shall have been Committed.

The object of this provision was to secure to the ac-

³¹ Thayer's Common Law Evidence, 90.

³² Thayer's Common Law Evidence, 86.

³³ Thayer's Common Law Evidence, 82. Note.

³⁴ Journal, 459-619.

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cused the right to be tried in the State where the crime was committed and to prevent his being taken out of the State for the purpose of trying him. Most of the States are now divided into districts and the trial takes place in the district where the crime was committed. This provision forbids an indictment in one State for a crime committed in another.⁸⁵

When a Crime is not committed within any State, the Trial, shall be had at such Place or Places as the Congress may by Law have directed.

This means that when a crime has been committed outside of a State, as for example, on the high seas, or elsewhere, the trial shall be held at such place as Congress may direct. In pursuance of this clause, the "Crimes Act" of 1789, the first passed after the adoption of the Constitution, provided "that the trial of crimes committed on the high seas, or in any other place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended or into which he may first be brought." It was held in *United States v. Dawson et al.*⁸⁶ that a crime committed against the laws of the United States, out of the limits of a State, is not local, but may be tried at such place as the Congress shall designate by law, and that (in reference to the particular case under consideration) this provision answered the argument concerning the jurisdiction of the court, as to venue, trial in the county, and the jury being taken from the vicinage, as well as in respect to the necessity of particular or fixed districts before the offence was committed. The only restriction which these words contain as to the place of trial, when the crime was not committed within a State, is, that Congress must direct the place where the trial shall occur, before it can take place, and the trial may occur at any place previously designated by Congress.⁸⁷

⁸⁵ *In re Rosdeitcher*, 33 Fed. Rep., 657, 658; *United States v. Conrad*, 59 Fed. Rep., 458.

⁸⁶ 15 Howard, 467, 488.

⁸⁷ *Cook v. United States*, 138 U. S., 157, 182.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

Neither the civil nor the common law gave any definition of treason.

In a very early day the doctrine of constructive treason grew up in England. Many persons were tried for offences against the King. There being no law as to what constituted treason against his Majesty, it was largely left for the judges to say what amounted to such an offence, and in many instances they construed the conduct of the accused as being treason, and this became known as the doctrine of constructive treason.

The liberality of the courts in construing this doctrine and the great number of executions which were brought about in this way caused Parliament to pass an act defining treason, which it did in 1352, in the reign of Edward III, who ascended the throne in 1327 and reigned fifty years.²⁸ This act, according to Blackstone, limited treason to any one of the following offences:

First. "When a man doth compass or imagine the death of our Lord the King, of our Lady his Queen, or of their eldest son and heir."

Second. "If a man do violate the King's companion, or the King's eldest daughter unmarried, or the wife of the King's eldest son and heir."

Third. "If a man do levy war against our Lord the King and his realm."

Fourth. "If a man be adherent to the King's enemies

²⁸ Blackstone says that two instances occurred in the reign of Edward IV of persons who were executed for *treasonable words*. One was a citizen of London who remarked that he would "make his son heir of the Crown," that being the sign of the house in which he lived; the other a gentleman whose favorite buck had been killed by the King while hunting, and thereupon the owner of the buck wished the buck, horns and all, in the king's belly. Each of these persons were executed because they had uttered treasonable words against the Crown. These, however, were deemed hard cases, and Chief Justice Markham chose to leave his place rather than assent to the judgment.—4 Blackstone, 57.

in his realm, giving to them aid and comfort in the realm, or elsewhere."

Fifth. "If a man counterfeit the King's great or privy seal."

Sixth. "If a man counterfeit the King's money; and if a man bring false money into the realm, counterfeit to the money of England, knowing the money to be false, to merchandise and make payment withal."

Seventh. "If a man slay the chancellor, treasurer, or the King's justices of the one bench or the other, justices in eyre, or justices of assize, and all other justices assigned to hear and determine, being in their places during their offices."³⁹

This act was in force at the time the Federal Constitution was framed and the members of the Convention were doubtless familiar with its provisions.

Definition of Treason.—As the Articles of Confederation did not define treason, it was natural that the framers of the Constitution should look to the English statute for a definition. This they did and from the third and fourth definitions of the English act, they framed the definition found in the Constitution.

Mr. Pinckney's plan was the only one which defined treason. It said, "Treason shall consist only in levying war against the United States or any of them, or in adhering to their enemies."⁴⁰

The report of the Committee of the Whole made no mention of the subject, but the Committee of Detail reported that "Treason against the United States shall consist only in levying war against the United States or any of them; and in adhering to the enemies of the United States or any of them."⁴¹ When the matter came up in the Convention, various views were expressed concerning the definition of treason.

Mr. Madison thought the definition too narrow. It did not appear to go as far as the statute of Edward III. He did not see why more latitude might not be left to the legislature. It would be as safe as in the hands of State legislatures; and it was inconvenient to bar a

³⁹ 4 Blackstone, 53-60.

⁴⁰ Journal, 68.

⁴¹ Journal, 454.

discretion which experience might enlighten, and which might be applied to good purpose as well as be abused.

Mr. Mason was for pursuing the statute of Edward III.

Mr. Gouverneur Morris was for giving to the Union an exclusive right to declare what should be treason. In case of a contest between the United States and a particular State, the people of the latter must, under the disjunctive terms of the clause, be traitors to one or other authority.

Mr. Randolph thought the clause defective in adopting the words, "in adhering," only. The British statute adds, "giving them aid and comfort," which had a more extensive meaning.

Mr. Ellsworth considered the definition as the same in fact with that of the statute.

Mr. Gouverneur Morris: "Adhering" does not go so far as "giving aid and comfort," or the latter words may be restrictive of "adhering." In either case the statute is not pursued. A motion was made that, "Treason against the United States shall consist only in levying war against them or in adhering to their enemies." The words, "giving them aid and comfort" were then added on motion of Col. Mason.⁴²

The term treason, as defined in the Constitution, means treason against the United States and does not include treason against a State.

This was a departure from the definition given by the Committee of Detail. The report of that committee made it treason to levy war against the United States, or against any particular State in the United States, but on the motion of Mr. Wilson and Mr. Johnson the latter part of this definition was unanimously rejected by the Convention,⁴³ and the offence was made to consist of acts against the United States in their collective capacity, as levying war against the United States, or in adhering to their enemies, that is, the enemies of the United States. The word "only," as used in the definition, is significant, as it limits the commission of treason to the instances mentioned in the Constitution.

Treason is the only crime which the Constitution de-

⁴² Journal, 563, 567.

⁴³ Journal, 564.

finer and it is beyond the power of Congress to enlarge or lessen the definition.^{43a}

Levying War.—As levying war against the United States constitutes treason, it is important to know what amounts to levying war. This was considered by Chief Justice Marshall, as early as 1807, in *Bowman's case*,⁴⁴ where it was held, "to constitute treason, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. . . . It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war."

Subsequently, the Chief Justice in the trial of Aaron Burr said, in referring to this language, according to the opinion it is not enough to be leagued in the conspiracy and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. That part, it is true, may be minute, it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the arms are assembled, but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act, of which alone the person who performs it

^{43a} Congress has defined treason as follows: "Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason." (R. S. sec. 5331.)

⁴⁴ 4 Cranch, 75, 125.

can be convicted.⁴⁵ This opinion covers the whole doctrine of treason and the courts have seldom, if ever, gone beyond it in discussing the general subject.

In *United States v. Greathouse*,⁴⁶ Mr. Justice Field on the circuit said, "To constitute a levying of war there must be an assemblage of persons in force, to overthrow the government, or to coerce its conduct. The words embrace not only those acts by which war is brought into existence, but also those acts by which war is prosecuted. They levy war who create or carry on war. The offence is complete, whether the force be directed to the entire overthrow of the government throughout the country, or only in certain portions of the country, or to defeat the execution and compel the repeal of one of its public laws."

So when war is levied against the United States all who aid in its prosecution, whether by open hostilities in the field, or by performing any part in the furtherance of the common object, however minute, or however remote from the scene of action are guilty of treason. A person being bound by his allegiance to a government, "who sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or misprision thereof. He voluntarily aids the treason. He cannot be permitted to stand on the nice metaphysical distinction that, although he knows that the purchaser buys the goods for the purpose of aiding the rebellion, he does not sell them for that purpose. The consequences of his act are too serious and enormous to admit of such a plea. He must be taken to intend the consequences of his own voluntary act." So a contract made for the purpose of aiding a rebellion, or in its furtherance and support is void, and will not be enforced in the courts.⁴⁷

Mr. Justice Curtis said, "The settled interpretation is, that the words 'levying war' include not only the act of making war for the purpose of entirely overturning the government, but also any combination forcibly to

⁴⁵ *Burr* trial, vol. 2, 438, 439.

⁴⁶ 4 *Sawyer*, 457, 466.

⁴⁷ *Hanauer v. Doane*, 12 *Wall.*, 342-345, 347.

oppose the execution of any public law of the United States, if accompanied or followed by an act of forcible opposition to such law, in pursuance of such combination. The following elements therefore constitute this offence:

"First, a combination or conspiracy, by which different individuals are united in one common purpose. Second, this purpose being to prevent the execution of some public law of the United States, by force. Third, the actual use of force by such combination, to prevent the execution of the law." (Approved and cited in *Druecker v. Salomon*, 21 Wis., 621-626.)

In this case the court said, "It is not necessary that there should be any military array or weapons, and the crime may be committed by those not personally present at the scene of violence, if they are leagued with the conspirators and perform any part, however minute." (p. 626.)

It is also treason for a number of persons to attempt by force to prevent the operation of the public laws, or to offer resistance to the exercise of the duly constituted authority of the Government.⁴⁸ So acts of violence by a number of persons with the purpose of suppressing an excise office, and to force the resignation of the excise officers, and to render an act of Congress unenforceable and void would be treason;⁴⁹ and an insurrection having for its purpose the suppression by force and through intimidation of the taxing officers and the prevention of the enforcement of the laws is treason.⁵⁰ But the mere assembling of a number of men, without the purpose of destroying property of the Government, though they are armed, is not treason.⁵¹

Giving Aid and Comfort to the Enemy.—We now come to the consideration of the last definition of treason, viz.: "Giving aid and comfort to the enemy." These words were not in the report of the Committee of Detail, but were added in the Convention on the motion of Mr. Mason, who thought the single expression, "Adhering

⁴⁸ 1 Story, 614.

⁴⁹ *United States v. Vigol*, 2 Dallas, 346.

⁵⁰ *United States v. Mitchell*, 2 Dallas, 348.

⁵¹ *United States v. Hoxie*, 1 Paine, 265.

to their enemies," was too indifferent. There was but little discussion on the amendment.

Mr. Wilson held "giving aid and comfort" to be explanatory, not operative words; and that it was better to omit them.

Mr. Dickinson thought the addition of "giving aid and comfort" unnecessary and improper; being too vague and extending too far.

Dr. Johnson considered "giving aid and comfort" as explanatory of "adhering."⁵² Only Connecticut, Delaware and Georgia voted against the motion.

What amounts to giving aid and comfort to the enemy? The purchasing of vessels, guns and ammunition and the employment of men to manage the vessel, if done in furtherance of a common design to aid a rebellion against the government constitutes giving aid and comfort to the enemy, though such enterprise should not be successful. If, for example, a vessel fully equipped and armed in the service of rebellion should fail in an attack upon one of the vessels of the United States and should be captured, nevertheless, in legal contemplation, it had given aid and comfort to the enemy. Also if a letter containing important intelligence for an enemy should be forwarded, this would constitute giving aid and comfort, though the letter should be intercepted on its way.

So sending money, or provisions or intelligence to rebels or enemies, though the money or intelligence should be intercepted and thereby fail in its purpose, yet the treason would be complete on the part of the one who sent it.⁵³

No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

This language was taken from an act of Parliament, passed in the reign of Edward VI, beginning in 1547 and ending in 1552. It refers to the evidence on the trial of the case after indictment.⁵⁴ The testimony of two

⁵² Journal, 567.

⁵³ United States v. Greathouse, 4 Sawyer, 472.

⁵⁴ Paschal, 212.

witnesses is necessary to the same overt act in order to convict one charged with treason. The crime of treason is so odious that it would have been dangerous to permit a conviction on the testimony of a single witness, so the provision was inserted, that there must be at least two witnesses to the act constituting treason, or the accused must confess in open court, to the commission of the offense before his guilt can be established.

The two witnesses are necessary only to the same overt act, but they must be witnesses to the same act. One witness to one act, and another to another act of treason, would not bring the proof within the language of the Constitution. The witnesses must also be such as a jury would believe.⁵⁵

In the Convention Mr. Dickinson wished to know what was meant by the "testimony of two witnesses;" whether they were to be witnesses to the same overt act, or to different overt acts. He thought, also, that proof of an overt act ought to be expressed as essential in the case.⁵⁶

Overt Act.—In the Convention it was moved to insert after the expression "two witnesses," the words "to the same overt act," but it is not known who made this motion. Dr. Franklin favored it. He said prosecutions for treason were generally virulent and perjury was too easily made use of against innocence.⁵⁷ The motion to insert these words prevailed by a vote of 8 to 3.

An overt act is an open act; one which shows or manifests a purpose to commit treason. What constitutes such an act, said Judge Blatchford, depends largely upon the facts and circumstances of each case. The delivery of prisoners would constitute such an act,⁵⁸ but a mere consultation or conspiracy to levy war, or mere words, whether oral, written or printed, however treasonable, criminal or seditious they may be in themselves, would not constitute an overt act of treason; but when spoken, written or printed in relation to the act, or acts which, if committed with a treasonable design might constitute such overt act, they are admissible as evidence tending

⁵⁵ Wigmore's Evidence, vol. 3, secs. 2036, 2038.

⁵⁶ Journal, 564.

⁵⁷ Journal, 566.

⁵⁸ United States v. Hodges, 26 Fed. Cases, 334.

to characterize it, and to show the intent with which the act was committed, and may furnish some evidence against the accused of the act itself.⁵⁹

Confession in Open Court.—These words were inserted on the motion of Luther Martin.⁶⁰ They did not cause any debate, and the motion prevailed by a vote of 7 to 3.

The term "open court" means before the court, in the presence of the court. A conviction for treason can not be had on a confession of the person accused of that crime, if it is made outside the court, though made voluntarily and without coercion, persuasion or undue influence.⁶¹

Enemy.—At the time the Constitution was adopted, said Justice Field, in *United States v. Greathouse*, the word "enemy" applied to the subjects of a foreign power, who were in a state of open hostility with the American people and did not include rebels in insurrection against their own government, and it is said that an enemy is always a subject of a foreign power who owes no allegiance to the United States.⁶²

But this definition has undergone modification, and the term enemy now has an additional significance to that embraced in the definition of Mr. Justice Field, growing out of the relation of the States to the General Government during the Civil War. In the *Prize* cases it was held, "All persons residing within the territory of the rebellious States whose property may be used to increase the revenues of the hostile power are in this contest, liable to be treated as enemies, though not foreigners. They have cast off their allegiance and made war on their government, and are none the less enemies because they are traitors."⁶³ From this it is deducible that those who join a rebellion to overthrow the government are enemies of the United States.

The Congress shall have Power to declare the Punish-

⁵⁹ 5 Blatchford, 550, Charge to Grand Jury.

⁶⁰ Journal, 567, 568.

⁶¹ 26 Fed. Cases, No. 15262.

⁶² 4 Sawyer, 457.

⁶³ 2 Black., 635-674.

ment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture, except during the Life of the Person Attainted.

The Punishment of Treason.—Mr. Pinckney's plan of a constitution provided "The Legislature of the United States shall have the power to declare the punishment of treason."⁶⁴ The other plans for a constitution did not contain any provision on the subject. The Committee of Detail adopted and reported the language of Mr. Pinckney.⁶⁵ The Committee on Style reported the clause as found in the Constitution.⁶⁶

It was not necessary for the Constitution to have expressly conferred the power upon Congress to declare the punishment of treason. That body would have the same authority to provide for the punishment of this offense that it would have to punish any offense against the Government. According to Blackstone, the punishment of treason in general was very solemn and terrible. The offender was drawn to the gallows, and not carried or allowed to walk, though usually (by connivance at length ripened by humanity into law) a sledge or hurdle was allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. That he be hanged by the neck, and then cut down alive. That his entrails be taken out and burned while he was yet alive. That his head be cut off. That his body be divided into four parts. That his head and quarters be at the King's disposal.⁶⁷

The Convention felt that by placing the punishment of treason at the discretion of Congress such barbarous atrocities would be avoided, while a sufficient penalty would be secured. The punishment was first prescribed by the act of April 30, 1790, and was death by hanging, and this continued to be the penalty until 1862, when it was changed, it is said, upon the recommendation of President Lincoln.⁶⁸ In that year Congress passed a law

⁶⁴ Journal, 68.

⁶⁵ Journal, 454.

⁶⁶ Journal, 710.

⁶⁷ Blackstone, vol. 4, 66.

⁶⁸ President Lincoln was so often asked to pardon persons convicted

providing that every person guilty of treason shall suffer death; or, at the discretion of the court, shall be imprisoned at hard labor for not less than five years, and fined not less than ten thousand dollars, to be levied on and collected out of any or all of his property, real and personal, of which he was the owner at the time of committing such treason, any sale or conveyance to the contrary notwithstanding; and every person so convicted of treason shall moreover, be incapable of holding any office under the United States.⁶⁹

Attainder of Treason.—The framers of the Constitution were careful to limit the powers of Congress in defining the punishment of treason so that no attainder of treason should work corruption of blood, or forfeiture, except during the life of the person attainted. The Constitutions of New York and Maryland contained a clause similar to this and from which, this was doubtless taken. By the common law, both corruption of blood and forfeiture of estate followed a conviction for this offense.

By attainder was meant the extinction of all civil rights and capacities which took place when a person who had committed treason or felony was sentenced to death.⁷⁰ Blackstone says that the consequences of attainder were forfeiture and corruption of blood, and that forfeiture was twofold; of real and personal estates; that by attainder in high treason a man forfeited to the King all his lands and tenements of every kind.⁷¹

This clause was considered by the Supreme Court in the case of *Cummings v. State of Missouri*.⁷² The case arose out of the following interesting facts:

In 1865 the State of Missouri amended its Constitution, which prohibited, among other things, any person acting

of treason, whom he did not think should suffer death (especially in cases of young persons whom he thought were influenced to do as they had), that he suggested to Congress it moderate the punishment which it did. Otherwise, it is hardly presumable that Congress would have reduced the punishment for this offense while a rebellion against the government was going on. It is a striking evidence of Mr. Lincoln's magnanimity.

⁶⁹ U. S. Revised Statutes, section 5332.

⁷⁰ 4 Stephen's Commentaries, 389, 15th ed.

⁷¹ 4 Blackstone, 306.

⁷² 4 Wallace, 277.

as a professor or teacher in any educational institution, or in any common or other school, who had not taken a certain oath of loyalty to the United States which the Constitution prescribed. In the fall of 1865, after the adoption of the Constitution, the Reverend Mr. Cummings, a priest of the Roman Catholic Church, was indicted and convicted in the State of Missouri of the crime of teaching and preaching as a priest and minister of that religious denomination, without having taken the prescribed oath, and was sentenced to pay a fine of five hundred dollars and committed to jail until the fine and the costs of the suit were paid. The judgment of the lower court was affirmed by the supreme court of the State, and from there it was taken to the Supreme Court of the United States, where the judgment of the supreme court of Missouri was reversed by the judgment of five of the justices as against four who dissented. The opinion was delivered by Mr. Justice Field who said (p. 320):

“The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuits of a lawful avocation, or from positions of trust, or from the privilege of appearing in the courts, or acting as an executor, administrator, or guardian, may also, and often has been, imposed as punishment. . . . The theory upon which our political institutions rest is that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined” (p. 321).

A bill of attainder was defined to be a “legislative act which inflicts punishment without a judicial trial (p. 323). If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addi-

tion to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense."

Corruption of blood or forfeiture.—"Forfeiture of goods and chattels and corruption of blood," says Blackstone, "followed as a consequence of attainder, that it extended both upwards and downwards, so that an attainted person could neither inherit lands or hereditaments from his ancestors, nor retain those he was in possession of, nor transmit them by descent to any heir, but that the same escheated to the lord of the fee, subject to the King's superior right of forfeiture."⁷³ The framers of the Constitution did not desire to extend the punishment so as to deprive the children and heirs of the attainted of their inheritable property. Such a provision in the organic law would not be in accordance with the spirit of the new government and it was to prevent such consequences that this provision was inserted in the Constitution and the punishment limited to the life of the attainted.

In the year 1862, during the great Civil War, Congress passed an act, which provided among other things that "to insure the speedy termination of the present rebellion it shall be the duty of the President of the United States to cause the seizure of all the estate and property; money, stocks, credits, and effects of the persons hereinafter named and to apply and use the same and the proceeds thereof for the support of the Army of the United States." The act then proceeded to name several classes of persons whose property should be liable to seizure. Among them was any person hereafter acting as an officer of the army or navy of the rebels in arms against the Government of the United States. The act also provided, "It shall be a sufficient bar to any suit brought by such persons for the possession or use of such property, or any of it, to allege and prove that he is one of the persons described in this section."⁷⁴

⁷³ 4 Blackstone, 308, 309.

⁷⁴ 12 Statutes at Large, 589, 590.

It is a part of the political history of those times that President Lincoln⁷⁵ almost immediately after the passage of this act prepared a message which he intended sending at once to Congress, vetoing the act on the ground that it was in conflict with the clause of the Constitution now under consideration. Learning the purpose of the President, Congress on the same day passed a joint resolution which provided among other things that no punishment or proceedings, under the act should be "so construed as to work a forfeiture of the real estate of the offender beyond *his natural life*."⁷⁶ The President, upon learning of the passage of this joint resolution, construed it as being a part of the bill, it having been passed on the same day as the bill, and regarding it as correcting the error which he complained of and therefore did not send his message to Congress vetoing the bill, but on the contrary approved it.

Several interesting and important cases have grown out of this legislation.

The first is the case of *Bigelow v. Forrest*.⁷⁷ Forrest was an officer in the navy of the Confederate States and was the owner in fee of certain real estate in the State of Virginia, which was seized by the Government and sold by legal proceedings under the aforesaid act to one Buntley, who subsequently transferred it to Bigelow. Forrest died intestate, leaving an only child and heir-at-law, Douglass Forrest, who was also an officer in the army of the Confederate States and who brought an action of ejectment against Bigelow for the possession of the land, which had been sold as the property of his father under the provisions of the aforesaid act. The case eventually went to the Supreme Court of the United States, where Mr. Justice Strong delivered the opinion. It was held (p. 350) that the act, and the joint resolution of the same day, explanatory of the act, should be construed together and that, under the provision of the Constitution, no interest in the realty could be conveyed to the purchaser beyond the life of Forrest. Answering the claim that the son had also been an officer in the Confederate service,

⁷⁵ 9 Wallace, 350.

⁷⁶ 12 Statutes at Large, 627.

⁷⁷ 9 Wallace 339.

and therefore was within one of the classes mentioned in the act, the court stated (p. 352) the land was not seized or condemned for any act of the son and that he had no interest in it at the time of the forfeiture and therefore could not have been heard in opposition to the decree ordering the land to be sold. If he was not at liberty to assert his claim he could not be deprived of his right to his property without trial and without due course of law. No other construction, said the court, can be given to the act. The punishment inflicted on the father can not be made to descend to his children and their blood is not to be corrupted.

This provision of the Constitution again came up for consideration in the case of *Day v. Micou*,⁷⁸ on the following facts, growing out of the aforesaid act and resolution of Congress: Certain real estate in the city of New Orleans was seized and sold under the act and resolution, as the property of Judah P. Benjamin. Some years before the sale, Mr. Benjamin had mortgaged the property to Madame Micou. The ground upon which the property was seized and sold was that Mr. Benjamin was included in one of the classes incorporated in the act of Congress—he being a member of the Confederate Cabinet.⁷⁹ At the sale, Day purchased the property, and subsequently Madame Micou filed a bill of foreclosure of her mortgage against Benjamin as the mortgagor and Day as being in possession. Benjamin made no defense, but Day set up that he was the owner of the property in fee simple, free of all incumbrances and liens by virtue of the proceedings which had been had by the Government. The court, however, held, as it had held in the case of *Bigelow v. Forrest*, that the government could only sell the life estate which Benjamin had in the

⁷⁸ 18 Wallace, 156.

⁷⁹ Mr. Benjamin was an eminent lawyer of New Orleans and a United States Senator from Louisiana at the beginning of the Civil War. On the 14th of March 1861, by reason of Mr. Benjamin's connection with the Southern Confederacy, the United States Senate passed a resolution that his name be omitted from the roll. Subsequently Mr. Benjamin became a member of President Davis's cabinet. At the close of the war he went to London, England, where he practiced his profession and attained eminent rank at the bar and there wrote and published his great work on Sales.

property and this was subject to any *bona fide* mortgage which had been put upon the real estate prior to the passage of the act.

Another important case in which the question was raised is that of *Wallach v. Van Riswick*.⁸⁰ Wallach was an officer

⁸⁰ 92 U. S., 202.

Pennsylvania was the first State to call a convention to ratify or reject the Constitution. It met in Philadelphia on Tuesday, November 20, 1787, less than two months after the Federal Convention adjourned. In the course of its proceedings, Mr. Wilson, who had been a leading member of the Convention which framed the Constitution, and who was also a leading member of the State convention, took occasion when the judiciary article was under consideration in that convention to speak of its various provisions.

As these were the first expressions upon these important subjects, and were made by one who was a prominent member of the body which framed and adopted them, and who was afterwards one of the Justices of the Supreme Court of the United States it is considered important from a historical standpoint and also because his remarks amount practically to a *construction* of these various provisions that what Mr. Wilson said upon that occasion be inserted here as a note:

"This is the first time that the article respecting the *judicial department* has come directly before us. I shall therefore take the liberty of making such observations as will enable honorable gentlemen to see the extent of the views of the Convention in forming this article, and the extent of its probable operation.

"This will enable gentlemen to bring before this house their objections more pointedly than, without any explanation, could be done. Upon a distinct examination of the different powers, I presume it will be found that not one of them is unnecessary. I will go farther—there is not one of them but will be discovered to be of such a nature as to be attended with very important advantages. I shall beg leave to promise one remark—that the Convention, when they formed this system, did not expect they were to deliver themselves, their relations, and their posterity, into the hands of such men as are described by the honorable gentlemen in opposition. They did not suppose that the Legislature, under this Constitution, would be an *association of demons*. They thought that a proper attention would be given, by the citizens of the United States, at the general election for members to the House of Representatives; they also believed that the particular States would nominate as good men as they have heretofore done, to represent them in the Senate. If they should now do otherwise, the fault will not be in Congress, but in the people or States themselves. I have mentioned oftener than once, that for a people wanting to themselves there is no remedy.

"The Convention thought further (for on this very subject there will appear caution, instead of imprudence in their transactions); they considered, that, if suspicions are to be entertained, they are to be entertained with regard to the objects in which government have separate interests and separate views from the interest and views of

in the Confederate army during the Civil War, and during his service certain real estate he owned in the city of Washington was seized and sold under the Confiscation Act already referred to, and purchased at the sale by Van Riswick. Before the property was seized, Wallach

the people. To say that officers of government will oppress when nothing can be got by oppression is making an inference, bad as human nature is, that can not be allowed. When persons can derive no advantage from it, it can never be expected they will sacrifice either their duty or their popularity.

"Whenever the general government can be a party against a citizen, the trial is guarded and secured in the Constitution itself, and therefore it is not in its power to oppress the citizen. In the case of treason, for example, though the prosecution is on the part of the United States, yet the Congress can neither define nor try the crime. If we have recourse to the history of the different governments that have hitherto subsisted, we shall find that a very great part of their tyranny over the people has arisen from the extension of the definition of treason. Some very remarkable instances have occurred, even in so free a country as England. If I recollect right, there is one instance that puts this matter in a very strong point of view. A person possessed a favorite buck, and, on finding it killed, wished the horns in the belly of the person who killed it. This happened to be the king; the injured complainant was tried and convicted of treason for wishing the king's death.

"I speak only of free governments; for, in despotic ones, treason depends entirely upon the will of the prince. Let this subject be attended to, and it will be discovered where the dangerous power of the government operates on the oppression of the people. Sensible of this, the Convention has guarded the people against it, by a particular and accurate definition of treason.

"It is very true that trial by jury is not mentioned in civil cases; but I take it that it is very improper to infer from hence that it was not meant to exist under this government. Where the people are represented, where the interest of government can not be separate from that of the people (and this is the case in trial between citizen and citizen) the power of making regulations with respect to the mode of trial may certainly be placed in the legislature; for I apprehend that the legislature will not do wrong in an instance from which they can derive no advantage. These were not all the reasons that influenced the Convention to leave it to the future Congress to make regulations on this head.

"By the Constitution of the different States, it will be found that no particular mode of trial by jury could be discovered that would suit them all. The manner of summoning jurors, their qualifications, of whom they should consist, and the course of their proceedings, are all different in the different States; and I presume it will be allowed a good general principle, that, in carrying into effect the laws of the general government by the judicial department, it will be proper to make the regulations as agreeable to the habits and wishes of the

had executed a deed of trust on it to secure the payment of a note for \$5,000.00. At the time the property was seized, a part of this debt remained unpaid and at that time was due to the defendant Van Riswick, who had purchased it. The only interest Wallach had in the

particular States as possible; and it is easily discovered that it would have been impracticable, by any general regulation, to give satisfaction to all. We must have thwarted the custom of eleven or twelve to have accommodated any one. Why do this when there was no danger to be apprehended from the omission? We could not go into a particular detail of the manner that would have suited each State.

"Time, reflection, and experience, will be necessary to suggest and mature the proper regulations on this subject; time and experience were not possessed by the Convention; they left it therefore to be particularly organized by the legislature—the representatives of the United States—from time to time, as should be most eligible and proper. Could they have done better?

"I know, in every part where opposition has arisen, what a handle has been made to this objection; but I trust, upon examination, it will be seen that more could not have been done with propriety. Gentlemen talk of bill of rights. What is the meaning of this clamor, after what has been urged? Though it may be proper, in a single State, whose legislature calls itself the sovereign and supreme power, yet it would be absurd in the body of the people, when they are delegating from among themselves persons to transact certain business, to add an enumeration of those things which they are not to do. 'But trial by jury is secured in the bill of rights of Pennsylvania; the parties have a right to trial by jury, which *ought* to be held sacred.' And what is the consequence? There have been more violations of this right in Pennsylvania, since the revolution, than are to be found in England in the course of a century.

"I hear no objection made to the tenure by which the judges hold their offices; it is declared that the judges shall hold them during good behavior;—nor to the security which they will have for their salaries; they shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

"The article respecting the judicial department is objected to as going too far, and is supposed to carry a very indefinite meaning. Let us examine this: 'The judicial power shall extend to all cases, in law and equity, arising under this Constitution and the laws of the United States.' Controversies may certainly arise under this Constitution and the laws of the United States, and is it not proper that there should be judges to decide them? The honorable gentlemen from Cumberland (Mr. Whitehill) says that laws may be made inconsistent with the Constitution; and that therefore the powers given to the judges are dangerous. For my part, Mr. President, I think the contrary inference true. If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence, and the particular powers

property at that time was his equity of redemption. After the sale Wallach and his wife made a deed to Van Riswick, by which they purported to convey the property in fee simple. After the death of Wallach his children brought suit in the Supreme Court of the Dis-

of government being defined, will declare such law to be null and void; for the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law.

"The judicial power extends to all cases arising under treaties made, or which shall be made, by the United States. I shall not repeat at this time, what has been said with regard to the power of the States to make treaties; it can not be controverted, that, when made, they ought to be observed. But it is highly proper that this regulation should be made; for the truth is,—and I am sorry to say it,—that in order to prevent the payment of British debts, and from other causes, our treaties have been violated, and violated too, by the express laws of several States in the Union. Pennsylvania—to her honor be it spoken—has hitherto done no act of this kind; but it is acknowledged on all sides, that many States in the Union have infringed the treaty; and it is well known, that, when the minister of the United States made a demand of Lord Carmarthen of a surrender of the western posts, he told the minister, with truth and justice, 'The treaty under which you claim those possessions has not been performed on your part; until that is done, those possessions will not be delivered up.' This clause, sir, will show the world that we make the faith of treaties a constitutional part of the character of the United States; that we secure its performance no longer nominally, for the judges of the United States will be enabled to carry it into effect, let the legislatures of the different States do what they may.

"The power of judges extends to all cases affecting ambassadors, other public ministers, and consuls. I presume very little objection will be offered to this clause; on the contrary it will be allowed proper and unexceptionable.

"This will also be allowed with regard to the following clause: '*all cases of admiralty and maritime jurisdiction.*'

"The next text is, 'to controversies to which the United States shall be a party.' Now, I apprehend it is something very incongruous, that, because the United States are a party, it should be urged, as an objection, that their judges ought not to decide, when the universal practice of all nations has, and unavoidably must have, admitted of this power. But, say the gentlemen, the sovereignty of the States is destroyed, if they should be engaged in a controversy with the United States, because a suitor in a court must acknowledge the jurisdiction of that court, and it is not the custom of sovereigns to suffer their names to be made use of in this manner. The answer is plain and easy; the government of each State ought to be subordinate to the government of the United States.

"*To controversies between two or more States.*' This power is vested in the present Congress; but they are unable, as I have already

trict of Columbia for the recovery of the real estate. That court decided that they could not recover.

The case was taken to the Supreme Court of the United States, where Mr. Justice Strong again delivered the opinion. After examining all the preceding cases and the

shown, to enforce their decision. The additional power of carrying their decree into execution, we find, is therefore necessary, and I presume no exception will be taken to it.

"Between a State and citizens of another State." When this power is attended to, it will be found to be a necessary one. Impartiality is the leading feature in this Constitution; it pervades the whole. When a citizen has a controversy with another State, there ought to be a tribunal where both parties may stand on a just and equal footing.

"Between citizens of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects." This part of the jurisdiction, I presume, will occasion more doubt than any other part; and, at first view, it may seem exposed to objections well founded and of great weight; but I apprehend this can be the case only at first view. Permit me to observe here, with regard to this power, or any other of the foregoing powers given to the federal court, that they are not exclusively given. In all instances, the parties may commence suits in the courts of the several States. Even the United States may submit to such decision if they think proper. Though the citizens of a State and the citizens or subjects of foreign States, may sue in the federal courts, it does not follow that they must sue. These are the instances in which the jurisdiction of the United States may be exercised; and we have all the reason in the world to believe that it will be exercised impartially; for it would be improper to infer that the judges would abandon their duty, the rather for being independent. Such a sentiment is contrary to experience, and ought not to be hazarded. If the people of the United States are fairly represented, and the President and the Senate are wise enough to choose men of abilities and integrity for judges, there can be no apprehension, because as I mentioned before, the government can have no interest in injuring the citizens.

"But when we consider the matter a little further, is it not necessary if we mean to restore either public or private credit, that foreigners, as well as ourselves, have a just and impartial tribunal to which they may resort? I would ask how a merchant must feel to have his property lie at the mercy of the laws of Rhode Island. I ask, further, how will a creditor feel who has his debts at the mercy of tender laws in other States? It is true that, under this Constitution, these particular iniquities may be restrained in future; but, sir, there are other ways of avoiding payment of debts. There have been installment acts, and other acts of a similar effect. Such things, sir, destroy the very sources of credit.

"Is it not an important object to extend our manufactures and our commerce? This can not be done unless a proper security is provided for the regular discharge of contracts. This security can not be

Confiscation Act of 1862, and the joint resolution passed on the same day and affirming the preceding decisions that the act and resolution must be construed together, the court reversed the decision of the lower court and awarded the property to the complainants. The case

obtained, unless we give the power of deciding upon those contracts to the general government.

"I will mention, further, an object that I take to be of particular magnitude, and I conceive these regulations will produce its accomplishment. The object, Mr. President, that I allude to is, *the improvement of our domestic navigation*, the instrument of trade between the several States. Private credit, which fell to decay from the destruction of public credit, by a too inefficient general government, will be restored; and this valuable intercourse among ourselves must give an increase to those useful improvements that will astonish the world. At present, how are we circumstanced! Merchants of eminence will tell you that they can not trust their property to the laws of the State in which their correspondents live! Their friend may die and may be succeeded by a representative of a very different character. If there be any particular objection that did not occur to me on this part of the Constitution, gentlemen will mention it; and I hope when this article is examined, it will be found to contain nothing but what is proper to be annexed to the general government. The next clause, so far as it gives original jurisdiction in cases affecting ambassadors, I apprehend, is perfectly unexceptionable.

"It was thought proper to give the citizens of foreign States full opportunity of obtaining justice in the general courts, and this they have by its appellate jurisdiction; therefore, in order to restore credit with those foreign States, that part of the article is necessary. I believe the alteration that will take place in their minds when they learn the operation of this clause, will be a great and important advantage to our country; nor is it any thing but justice; they ought to have the same security against the State laws that may be made, that the citizens have; because regulations ought to be equally just in the one case as in the other. Further, it is necessary in order to preserve peace with foreign nations. Let us suppose the case, that a wicked law is made in some one of the States enabling a debtor to pay his creditor with the fourth, fifth, or sixth part of the real value of the debt, and this creditor, a foreigner, complains to his prince or sovereign, of the injustice that has been done him. What can that prince or sovereign do? Bound by inclination, as well as duty to redress the wrong his subject sustains from the hand of perfidy, he can not apply to the particular guilty State, because he knows that, by the Articles of Confederation, it is declared that no State shall enter into treaties. He must therefore apply to the United States; the United States must be accountable. 'My subject has received a flagrant injury; do me justice, or I will do myself justice.' If the United States are answerable for the injury, ought they not possess the means of compelling the faulty State to repair it? They ought; and this is what is done here. For now, if complaint is made in

is cited here because of the importance of the language of Mr. Justice Strong when referring to the constitutional provision (p. 210):

“What was intended by the constitutional provision is free from doubt. In England, attainders of treason worked corruption of blood and perpetual forfeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. For this reason, it was ordained that no attainder of treason should work corruption of blood or forfeiture, except during the life of the person

consequence of such injustice, Congress can answer, ‘Why did not your subject apply to the General Court, where the unequal and partial laws of a particular State would have had no force?’

“In two cases the Supreme Court has original jurisdiction—that affecting ambassadors, and when a State shall be a party. It is true it has appellate jurisdiction in more, but it will have it under such restrictions as the Congress shall ordain. I believe that any gentleman, possessed of experience or knowledge on this subject, will agree that it was impossible to go further with any safety or propriety, and that it was best left in the manner in which it now stands.

“*In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact.*” The jurisdiction as to fact may be thought improper; but those possessed of information on this head see that it is necessary. We find it essentially necessary from the ample experience we have had in the courts of admiralty with regard to captures. Those gentlemen who, during the late war, had their vessels retaken, know well what a poor chance they would have had when those vessels were taken in their States and tried by juries, and in what a situation they would have been if the Court of Appeals had not been possessed of authority to reconsider and set aside the verdicts of those juries. Attempts were made by some of the States to destroy this power; but it has been confirmed in every instance.

There are other cases in which it will be necessary; and will not Congress better regulate them, as they arise from time to time, than could have been done by the Convention? Besides, if the regulations shall be attended with inconvenience, the Congress can alter them as soon as discovered. But anything done in Convention must remain unalterable but by the power of the citizens of the United States at large.

“I think these reasons will show that the powers given to the Supreme Court are not only safe, but constitute a wise and valuable part of the system.” 2 Elliot, 486-494.

attainted. No one ever doubted that it was a provision introduced for the benefit of the children and heirs alone; a declaration that the children should not bear the iniquity of the fathers. Its purpose has never been thought to be a benefit to the traitor, by leaving in him a vested interest in the subject of forfeiture."⁸¹

⁸¹ In closing his consideration of the subject of judicial power the author desires to call attention to what seems to be a singular omission in this connection.

The power of the President to appoint members of the federal judiciary is practically without limit, except as to numbers.

Under the Constitution the President, senators and representatives must possess certain qualifications, but it is not so with members of the judiciary. No qualification is prescribed for them, not even age, character or citizenship. The statute establishing the federal courts provided that the attorney-general and the district attorneys shall be "learned in the law," but neither the Constitution nor the statute requires such qualifications for judges, not even the members of the Supreme Court. In selecting a judge the President is not even required to choose a member of the legal profession. He may appoint whom he pleases to the Federal bench. The unlimited power vested in the President in this matter has never been abused, but it may be, and should the Senate not possess the courage or disposition to meet the occasion and refuse to confirm the appointee an embarrassing condition might possibly arise.

CHAPTER XLIV.

JUDICIAL POWER OVER LEGISLATION.

The Constitution does not confer authority upon the courts to declare an act of Congress to be in conflict with that instrument, yet from the beginning of the Government the courts have exercised such power, and will continue to do so. If there is no direct authority in the Constitution for the exercise of this power by the courts, where do they get it? Much has been said and written upon the subject, from the date of the Constitutional Convention to the present, and publicists and authors are still unable to agree upon it,¹ though the courts assert their right to do so with great confidence, and it is now the generally accepted opinion that they are right in exercising the power.

The English courts do not possess the right to pass upon the validity of legislative acts,² and it is asserted by

¹ See the very able and scholarly article of Prof. William Trickett, the learned Dean of the Law School at Carlisle, Pennsylvania, in the 40th vol. of the American Law Review, 356, and an able article by the same author, in the 41st American Law Review, 651, in which the power of the courts to declare legislation unconstitutional is challenged; also an able article in 40th American Law Review, 641, by William M. Meigs, sustaining the right of the courts to declare acts of legislation unconstitutional.

On April 27, 1906, Hon. Walter Clark, Chief Justice of North Carolina, delivered an address before the law department of the University of Pennsylvania, in which he asserted that the Constitution conferred no power on the courts to declare legislation invalid. Among other things he said: "The action of the Supreme Court in assuming the power to declare acts of Congress unconstitutional was without a line in the Constitution to authorize it, either expressly or by implication." Congressional Record, June 15, 1908, pp. 8063, 8065.

² It is the understanding of the author, that in England a committee of eminent lawyers, called the Committee of Revision, examine all bills submitted to Parliament. If the committee approves a bill and it passes, its constitutionality is not questioned by the courts. This may in part account for the English courts not passing upon the validity of the legislation.

an authoritative writer on the Constitution that there is not a European court which has the authority to declare legislation void because it conflicts with the Constitution of the country.³ Prior to the English Revolution of 1688, the courts of England, at times, exercised the power, but since then have not done so. The doctrine in a modern sense is peculiar to the American courts and its exercise is the subject of special criticism in many countries of Europe.⁴ The laws of Hawaii have recently conferred upon courts of record the power to decide upon the constitutionality of legislation and this is, perhaps, the only instance where such authority is given by a constitution, or by a statute.⁵

The Question in the State Courts before the adoption of the Constitution.—Several of the State courts, before the adoption of the Federal Constitution, decided they had the power to pass upon the validity of laws and declare them void if they conflicted with their State Constitutions. This doctrine was held by the Court of Appeals of Virginia in *Commonwealth v. Caton*,⁶ in 1782, where the court decided an act to be unconstitutional which took from the chief executive of the State the power of pardon which the Constitution of the State conferred upon him.⁷

On the 27th of August, 1784, the mayor's court of New York, in *Rutgers v. Waddington*, held a statute of that State void. As the result of the decision, a public meeting was called and an address was issued complaining in a bitter manner of the decision. Among other things the address contained the following, "That there should be a power vested in courts of judicature, whereby they might control the supreme legislative power, we think is absurd in itself. Such power in courts would be de-

³ Black's Constitutional Law, 53.

⁴ Woodburn's American Republic, 328.

⁵ Laws of Hawaii, sec. 1622.

⁶ The following interesting note follows the report of this case: "It is said that this was the first case in the United States, where the question relative to the *nullity* of an unconstitutional law was ever discussed before a judicial tribunal; and the firmness of the judges (particularly of Mr. Wythe), was highly honorable to them, and will always be applauded, as having incidentally, fixed a precedent, whereon a general practice, which the people of this country think essential to their rights and liberty has been established."

⁷ 4 Call's Reports, 20.

structive of liberty, and remove all security of property." The House of Assembly of the State passed a resolution on the subject "that the judgment was in its tendency subversive of all laws and good order and leads directly to anarchy and confusion."⁸

In 1786, in the celebrated case of *Trevitt v. Weedon*, the superior court of Rhode Island decided that an act of the legislature of that State was void which made it an offense for anyone to refuse to receive the bills of a bank chartered by the State on the same terms as they received specie, or who should depreciate the value of the bank's bills. The act denied the right of jury trial to those accused of violating its provisions, although a jury trial was provided for in the colonial charter of the State.⁹ The following year the supreme court of North Carolina in *Bayard v. Singleton*, held an act void which deprived a person of a jury trial when the ownership of property was involved.¹⁰

The decision in each of these cases created great excitement in their respective States. Iredell, afterwards a justice of the Supreme Court of the United States, was of counsel in *Bayard v. Singleton*, and while the case was pending he published a letter written to a prominent citizen of the State in defense of the power of the court to deny the validity of legislation. This brought upon him much severe criticism.

The judges who decided the case of *Trevitt v. Weedon* were impeached as criminals, and though they were not removed on account of their impeachment they were not re-elected at the expiration of their term of office.¹¹

⁸ For a full account of this decision and the feeling it created see Thayer's *Constitutional Cases*, 63, note.

⁹ Thayer's *Constitutional Cases*, 73. The following note on this case is found in Cooley's *Constitutional Limitations*, 7th edition, 55. "It is worthy of note that the first well authenticated case in which a legislative act was held void for incompatibility with the Constitution of a State, was *Trevitt v. Weedon*." Judge Cooley, however, fails to mention the case of *Commonwealth v. Caton* (*supra*).

¹⁰ 1 *Martin N. C.*, 42.

¹¹ As late as 1807 Calvin Pease, a judge of the Court of Common Pleas in the State of Ohio, and Judges Huntington and Todd of the Supreme Court of that State, were impeached for declaring an act of the General Assembly of 1805 to be unconstitutional. The act in question gave justices of the peace jurisdiction to decide questions

The Question in the Constitutional Convention.—The Constitution not only fails to confer express authority upon the courts to declare an act of Congress void, but no attempt was made to secure the insertion of language in the Constitution which would confer such power upon the courts. What occurred in the Convention may be seen by an examination of the proceedings of that body.

The eighth resolution of Mr. Randolph's plan of a constitution read, "That the Executive, and a convenient number of the national judiciary, ought to compose a Council of Revision,"¹² with authority to examine every act of the National Legislature, before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said

involving more than twenty dollars, without a jury trial. The court held that this violated the 7th Amendment of the Constitution of the United States, which provides that in any suit at common law where the amount in controversy exceeds twenty dollars, the right of trial by jury shall be preserved; and that the act also violated the State Constitution, which provided the right of trial by jury shall be "inviolable." Subsequently the proceedings against Judge Huntington, who had been elected Governor of the State, were abandoned, but they were prosecuted against Judges Pease and Todd. The proceedings were first had against Judge Pease, who was impeached upon three grounds. After a trial which lasted several days he was unanimously acquitted of the first charge. On the second charge he was also acquitted; the vote standing fifteen for conviction and nine for acquittal. On the third charge he was acquitted, the vote standing sixteen for conviction and eight for acquittal, the Constitution requiring the concurrence of two-thirds for conviction in such cases. The proceedings against Judge Todd were then dismissed. Cooley's Constitutional Limitations, 7th ed., 229, note.

¹² The Constitution of New York, adopted in 1777, provided for a Council of Revision consisting of the Governor, Chancellor, and the Judges of the Supreme Court, to which all bills were submitted. It is probable that Mr. Randolph's provision was suggested by that of the New York Constitution.

Chancellor Kent pays the following tribute to the Council of Revision: "The control which the judicial power of the State had, until the year 1823, over the passing of laws by the institution of the *Council of Revision*, anticipated in a great degree the necessity of this exercise of duty (by the courts). A law containing unconstitutional provisions was not likely to escape the notice and objection of the Council of Revision and the records of that body will show that many a bill which had heedlessly passed the two houses of the legislature was objected to and defeated on Constitutional grounds. 1 Kent, 491, 11th ed.

council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular legislature be again negatived by so many of the members of each branch."¹³ This plan only provided that the executive together with a convenient number (how many would that be?) of the national judiciary (presumably meaning the Supreme Court) should constitute a Council to review every act before it should operate, and that the dissent of the council (*not the judges only, but the whole Council*) should amount to a rejection. This did not amount to conferring power on the *judiciary* to pass upon the constitutionality of legislation.

This resolution was considered by the Convention in the Committee of the Whole, and Mr. Gerry at once expressed doubts whether the judiciary ought to form a part of the Council of Revision, as they will have a sufficient check against encroachments of their own department by their exposition of the laws, which involved the power of deciding on their constitutionality. In some States, he said, the judges had actually set aside laws as being against the Constitution. This was done, too, with general approbation. It was quite foreign from the nature of their office to make them judges of the policy of public measures. He then moved to postpone the consideration of the resolution, and proposed that the Executive alone have the right to negative a legislative act. Mr. King seconded this motion and observed "the judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation." Mr. Wilson favored giving the Executive and judiciary jointly an absolute negative. At this point the Convention passed the motion of Mr. Gerry to postpone the consideration of the resolution of Mr. Randolph, so the Convention did not further consider the matter of a joint Council of Revision till a later day.¹⁴ When Mr. Wilson moved a reconsideration of Mr. Randolph's resolution, and Mr. Madison seconded it, and spoke for it at some length.¹⁵ Various members spoke briefly on the motion. Mr. Pinckney opposed the judges having

¹³ Journal, 62.

¹⁴ Journal, 102.

¹⁵ Journal, 121.

a negative; so did Mr. Dickinson. The committee then voted on the motion of Mr. Wilson, and it resulted in Connecticut, New York and Virginia voting for it, and Massachusetts, New Jersey, Pennsylvania, Delaware, Maryland, North Carolina and Georgia against it. Ayes 3; nays 7.¹⁶

Mr. Wilson moved "that the supreme national judiciary (that meant all the supreme judges) should be associated with the Executive in the revisionary power." This was the same motion (except as to the number of the judges) which had been defeated. Among other things in support of his amendment, Mr. Wilson said, "Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the judges in refusing to give them effect. Let them have a share in the revisionary power, and they will have an opportunity of taking notice of those characters of a law, and of counteracting, by the weight of their opinions, the improper views of the Legislature."¹⁷ This motion was seconded by Madison, who favored it in a lengthy speech. Mr. Ellsworth and Mr. Mason approved it: Mr. Gerry, Mr. Strong and Mr. Gorham opposed it. Mr. Gouverneur Morris spoke in favor of it.

Mr. Luther Martin opposed it. He considered the association of the judges with the Executive as a dangerous innovation, as well as one that could not produce the particular advantage expected from it. A knowledge of mankind and of legislative affairs can not be presumed to belong in a higher degree to the judges than to the Legislature. As to the constitutionality of laws, that point will come before the judges in their official character. In this character they have a negative on the laws. Join them with the Executive in the revision, and they will have a double negative.¹⁸ Mr. Rutledge thought the amendment should be adopted.¹⁹ The question being put the motion was lost by three to four. Thus, a second time the Convention voted against joining the judiciary with the

¹⁶ Journal, 123.

¹⁷ Journal, 398.

¹⁸ Journal, 402.

¹⁹ Journal, 405.

Executive and to give them power to revise acts of Congress.

At a much later period in the Convention, Mr. Madison moved to amend one of the articles in the report to the Committee of Detail so it would read, "Every bill which shall have passed the two Houses shall, before it become a law, be severally presented to the President of the United States, and to the judges of the Supreme Court, for the revision of each. If, upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it; but if, upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objections against it, to that House in which it shall have originated."²⁰ Another short debate occurred. Mr. Mercer disapproved the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made and then be uncontrollable.²¹ The amendment being voted on, it was lost by a vote of three to eight, the same vote that the original amendment was defeated by. This was the third and the last time the matter was voted on in the Convention. It had been defeated three times, had occupied much of the Convention's time, and many of the ablest men in that body had debated it.

Why the question of giving the *judiciary alone* the power to pass on the constitutionality of legislative acts was not submitted to the Convention does not appear. There is nothing in the proceedings of the Convention to indicate that such a motion was made, or even desired, but two reasons, at least, suggest themselves why such a motion was not made. The friends of the measure may not have desired it to pass in that way, or they may have thought if it did pass it would be opposed in the State conventions, and possibly cause strong opposition to the Constitution.

The Question in the State Conventions.—In some of the State conventions called to consider the ratification or rejection of the Constitution, some of the members expressed themselves in favor of the courts exercising such

²⁰ Journal, 533.

²¹ Journal, 538.

power. In the Connecticut convention Oliver Ellsworth, afterwards chief justice of the Supreme Court, said: "This Constitution defines the extent of the powers of the general government. If the general legislature should at any time overstep their limits the judicial department is a constitutional check. If the United States go beyond their powers, if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality are to be made independent, will declare it to be void."²²

In the Virginia Convention, John Marshall said upon this question: "If the United States were to make a law not warranted by any of the powers enumerated it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void. To what quarter will you look for protection from an infringement on the Constitution, if you will not give the power to the judiciary? There is no other body that can afford such protection."²³

Charles Pinckney in the South Carolina Convention used this language, in referring to the Supreme Court: "It would be their duty not only to decide all national questions which should arise within the Union, but to control and keep the State judicials within their proper limits whenever they shall attempt to interfere with its power."²⁴ In the convention of Pennsylvania James Wilson, who had been a member of the Constitutional Convention and afterwards became a justice of the Supreme Court of the United States, said, "If a law should be made inconsistent with those powers vested by this instrument in Congress, the judges, as a consequence of their independence and the particular powers of government being defined, will declare such law to be null and void. For the power of the Constitution predominates. Anything, therefore, that shall be enacted by Congress contrary thereto, will not have the force of law."²⁵ Luther Martin, a member of the Convention from Maryland, delivered an address to the

²² Elliot, vol. 2, 196.

²³ Elliot, vol. 3, 553.

²⁴ Elliot, vol. 4, 258.

²⁵ American Historical Review, vol. 13, No. 2, 284.

legislature of that State after the Constitutional Convention had adjourned, in which he stated in reference to the courts created by the Constitution: "These courts, and these only, will have a right to decide upon the laws of the United States, and all questions arising upon their construction, and in a judicial manner to carry those laws into execution."²⁶

Hamilton, who does not seem to have taken part in the discussion of the question when it was before the Convention,²⁷ advocated the right of the courts to exercise such power. "Some perplexity," said he, "respecting the right of the courts to pronounce legislative acts void because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. * * * If it be said that the legislative body are themselves the constitutional judges of their own powers, and that the construction they put upon them is conclusive upon the other departments, it may be answered, that this cannot be the natural presumption where it is not to be recollected from any particular provisions in the Constitution. It is not otherwise to be supposed, that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the Legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the Judges, as a fundamental law. It must, therefore, belong to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. * * * It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the Legislature. This might as well happen in the case of two

²⁶ Elliot, vol. 1, 380.

²⁷ Hamilton was absent from the Convention much of the time, and this may account for his not taking part in the discussion of the subject before that body.

contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise *will* instead of *judgment*, the consequence would equally be the substitution of their pleasure to that of the legislative body."²⁸

The Question in the State Legislatures.—In 1798 the Legislature of Kentucky passed a series of resolutions drawn by Mr. Jefferson, expressing the disapproval by that State of the Alien and Sedition Laws passed by Congress, and declaring them unconstitutional, and announcing the doctrine that each State had the right to judge for itself "as well of infractions as of the mode and measure of redress."²⁹ A few days thereafter the Legislature of Virginia expressed its disapproval of the same laws in a series of resolutions drawn by Mr. Madison, one of which declared said acts to be unconstitutional. Copies of these resolutions were transmitted to the Governors of the different States, with the request that their Legislatures express similar resolutions, but those States which replied adopted resolutions strongly disagreeing with the expressions and sentiments sent them. Mr. Madison admits that the States which did not reply to the resolutions did not approve them³⁰ and that Kentucky and Virginia stood alone in the matter.

In 1809 the Legislature of Pennsylvania passed a series of resolutions on the general relation existing between the Government and the respective States, growing out of the case of *Olmstead v. Rittenhouse*,³¹ and among them was the following: "Resolved, that our Senators in Congress be instructed and our Representatives requested to use their influence to procure an amendment to the Constitution of the United States, that an impartial tribunal may be established, to determine disputes between the General and State Governments." This resolution,

²⁸ The Federalist, No. 78.

²⁹ It will be observed that the resolutions did not deny that the Supreme Court had the power to construe the Constitution or pass upon the validity of laws, but only asserted *the right of a State also to declare laws to be contrary to the Constitution*.

³⁰ North American Review, 1830, vol. 31, 500-505.

³¹ 5 Cranch, 115.

together with others, was transmitted by the Governor of the State to the respective States in the Union. New Hampshire, Vermont, North Carolina, Virginia, Maryland, Georgia, Tennessee, Kentucky and New Jersey responded in opposition to the resolution while not a single State responded in favor of it.³² The response of Virginia was especially notable, in that it declared that such tribunal already existed in the Supreme Court of the United States, which was eminently qualified for such delicate and important duties.³³ A few years later Pennsylvania went on record in a very different manner from what it formerly had and expressed its faith in the Supreme Court as the rightful and ultimate arbiter to pass upon the constitutionality of laws and infractions of the Constitution.³⁴

In 1828 the Legislature of South Carolina expressed the views of that State on the tariff in much the same way Virginia and Kentucky had expressed theirs on the Alien and Sedition Laws. Mr. Madison's summary of those laws may be accepted as a true construction of their intent and purpose. The Virginia Resolutions, says he, "deny that the Supreme Court is the sole tribunal competent to decide questions touching breaches of the compact, and claim that the States must decide for themselves. The South Carolina doctrine is, that the State legislatures are rightfully judges of the constitutionality of laws of the United States, and that when one State judges a law to be unconstitutional and nullifies it, its operation is suspended till Congress has procured a ratification of it, by an amendment of the Constitution; and that the Supreme Court of the United States is not competent to judge of questions involving State sovereignty."³⁵ The following year Virginia through its Legislature passed a resolution, "That there is no common arbiter to construe the Constitution of the United States,"³⁶ the Con-

³² North American Review, vol. 31, 507, 509.

³³ North American Review, vol. 31, 510.

³⁴ Laws of Pennsylvania of 1831, 505.

³⁵ This was the origin of the celebrated doctrine of nullification with which President Jackson dealt so promptly and vigorously.

³⁶ The sentiment of these resolutions which so shocked the country, was not very different from that expressed in the opinion of Chief

stitution being a federative compact between sovereign States; each State has a right to construe the compact for itself." Georgia and South Carolina subsequently advocated the same doctrine.³⁷

The Question in the Federal Courts.—Having shown that some of the State courts had decided acts of legislation to be contrary to their Constitutions, before the Federal Constitution was framed, and having traced the history of this subject through the Constitutional Convention and seen that that body did not confer express authority on judges to declare acts of Congress void, and having also followed it in the State conventions and shown the attitude of some of the States towards it, we turn to examine what the Federal courts have done, and to see how they have treated the question, and to what they ascribe their

Justice McKean of Pennsylvania, in the early case of *Republica v. Corbet*, Dallas, 467, 473, 474, in which he said:

"The Government of the United States forms a part of the government of each State; its jurisdiction extends to the providing for common defense against exterior injuries and violence, the regulation of commerce, and other matters specially enumerated in the Constitution; all other powers remain in the individual States, comprehending the interior and other concerns; these combined, form one complete government. Should there be any defect in this form of government or any collision occur, it cannot be remedied by the sole act of the Congress, or of a State; the people must be resorted to, for enlargement or modification. If a State should differ with the United States about the construction of them, there is no common umpire but the people, who should adjust the affairs by making amendments in the constitutional way, or suffer from the defect. In such a case the Constitution of the United States is federal; it is a league or treaty made by the individual State as one party, and all the States, as another party. When two nations differ about the meaning of any clause, sentence, or word in a treaty, neither has an exclusive right to decide it, they endeavor to adjust the matter by negotiation, but if it cannot be thus accomplished, each has a right to retain its own interpretation, until a reference be had to the mediation of other nations, an arbitration, or the fate of war. There is no provision in the Constitution, that in such a case the Judges of the Supreme Court of the United States shall control and be conclusive, neither can the Congress by a law confer that power. There appears to be a defect in this matter, it is a *casus omissus*, which ought in some way to be remedied. Perhaps the Vice-President and Senate of the United States; or commissioners appointed, say, one by each State, would be a more proper tribunal than the Supreme Court. Be that as it may, I rather think the remedy must be found in an amendment of the Constitution."

³⁷ 1 Story on Constitution, 270, note.

power over the subject. The question was probably first decided in the Federal tribunals on the circuit in Van Horn's Lessee v. Dorrance,³⁸ where in 1795 Justice Patterson said: "I take it to be a clear position that if a legislative act oppugns a constitutional principle, the former must give way, and be rejected on the force of repugnance. I hold it to be a position equally clear and sound, that in such case it will be the duty of the court to adhere to the Constitution, and declare the act null and void."

We next find it mentioned in the oral argument of Marshall, in Ware v. Hylton,³⁹ where he *challenged the power of the court to pass upon the validity of legislation*. "The legislative authority of any country," he said, "can only be restrained by its own municipal constitution; this is a principle that springs from the very nature of society; and the judicial authority can have no right to question the validity of a law, unless such a jurisdiction is expressly given by the Constitution. It is not necessary to enquire, how the judicial authority should act, if the legislature were evidently to violate any of the laws of God; but property is the creature of civil society, and subject, in all respects, to the disposition and control of civil institutions."

The question, for the first time, was considered by the Supreme Court of the United States in Cooper v. Telfair.⁴⁰

This case involved the validity of an act of the legislature of Georgia passed in 1782, which constituted a bill of attainder. The court delivered its opinion *seriatim*. Mr. Justice Washington said he could not hold the act void, because the plaintiff in error had not shown that the offense with which he was charged had been committed in any county in the State of Georgia. Mr. Justice

³⁸ 2 Dallas, 309.

In a scholarly article, published in the American Historical Review for January, 1908, 281-285, Prof. Max Farrand strongly contends that the United States Circuit Court, consisting of Judges Wilson, Blair and Peters, decided an Act of Congress unconstitutional in 1792, three years before the decision in Van Horn's Lessee v. Dorrance.

³⁹ 3 Dallas, 211.

⁴⁰ 4 Dallas, 14.

Chase held, "I agree, for reasons which have been assigned, to affirm the judgment. Before the plaintiff in error can claim the benefit of a trial by jury, under the Constitution, it was, at least, incumbent upon him to show that the offense charged was committed in some county of Georgia. . . . There is likewise a material difference between laws passed by the States during the Revolution, and laws passed subsequent to the organization of the Federal Constitution. Few of the Revolutionary acts would stand the rigorous tests now applied, and although it is an alleged fact that all acts of the legislature in direct opposition to the prohibition of the Constitution would be void, yet it still remains a question where the power resides to declare it void. It is indeed a general opinion, it is expressly admitted by all this bar, and some of the Judges individually in the circuits decided that the Supreme Court can declare an act of Congress to be unconstitutional and therefore invalid; but there is no adjudication of the Supreme Court itself upon the point. I concur, however, in the general sentiment with reference to the period when the existing Constitution came into operation; but whether the power, under the existing Constitution, can be applied to invalidate laws previously enacted is a very different question, turning upon very different principles; and with respect to which I abstain from giving an opinion." Justice Paterson said, among other things, "The Constitutions of the States of the Union contain the same general principles and restrictions; but it never was imagined that they applied to a case like the present; and to authorize this court to pronounce any law void, it must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative application." Justice Cushing used this language, "Although I am of opinion that this court has the same power that a court of the State of Georgia would possess, to declare the law void, I do not think that the occasion would warrant an exercise of the power."

We have seen that at the time Marshall was a member of the Virginia Convention he thought the judiciary could declare certain laws void, but his argument in *Ware v. Hylton* was at variance with what he said in the *Con-*

vention. Seven years after the decision in *Ware v. Hylton* the great case of *Marbury v. Madison*⁴¹ was decided. Marshall, who in the interval had been appointed Chief Justice, delivered the opinion. The authority of the courts to declare an act of Congress void was distinctly announced for the first time, though the opinion does not specifically point out the source of power, which authorizes the court to do so, but is general and bases the power of the court upon fundamental principles generally, rather than upon any power conferred by the Constitution. In his opinion Marshall said (p. 177), "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So, if a law be in opposition to the Constitution; if both the law and the Constitution applied to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

But this did not establish the proposition that the Constitution confers direct authority on the courts to judge an act of legislation unconstitutional, nor does it point out the source of their power to do so. In his opinion, Marshall failed to notice his argument in *Ware v. Hylton*, and returned to the position he had taken as a member of the Virginia Convention. This opinion of Marshall was reviewed by Gibson, J., in *Eakin v. Raub*,⁴² who said (p. 346): "It is not a little remarkable, that although the right in question has all along been claimed by the judiciary (i. e., to declare a law void which con-

⁴¹ 1 Cranch, 147.

Kent says that Marshall, in *Marbury v. Madison*, showed the power and duty of the judiciary to disregard an unconstitutional act of Congress or of any State legislature in an argument approaching the precision and certainty of a mathematical demonstration. 1 Kent, 490, 11th Ed.

⁴² 12 Sergeant & Rawle, 330, 346.

dicts with the Constitution) no judge has ventured to discuss it, except Chief Justice Marshall (in *Marbury v. Madison*), and if the argument of a jurist so distinguished for the strength of his ratiocinative powers be found inconclusive, it may be fairly set down to the weakness of the position which he attempts to defend." A majority of the court in *Eakin v. Raub* held it to be the right and duty of a court to declare an act of the legislature which conflicted with the constitution void, and the opinion of Gibson was a most forceful dissent from that doctrine. Some years after, when the case of *Norris v. Clymer*,⁴³ was being argued before the court and the decision in *Eakin v. Raub* was referred to, Gibson, then Chief Justice, said to counsel: "I have changed that opinion (meaning his opinion in *Eakin v. Raub*) for two reasons, first the late Convention, by their silence sanctioned the pretensions of the courts to deal freely with the acts of the legislature; and, second, from experience of the necessity of the case."⁴⁴

Justice Story in his opinion in *Martin v. Hunter*,⁴⁵ held, "The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity." A few years later in *Cohens v. Virginia*,⁴⁶ Marshall said, "The constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. In a government so constituted, is it unreasonable that

⁴³ 2 Pa. State, 281.

⁴⁴ Gibson seems to have been like Marshall—his opinion on the subject in controversy fluctuated. In *Eakin v. Raub*, he said, "I am aware that a right to declare all unconstitutional acts void, without distinction as to either constitution, is generally held as a professional dogma, but I apprehend, rather as a matter of faith than of reason. I admit that I once embraced the same doctrine, but without examination." Later in *Menges v. Wertman* in 1st Pa. St., 222, he said: "There must be some independent organ to arrest unconstitutional legislation, or the citizen must hold his property at the will of an uncontrollable power. It would be useless for the people to impose restriction on legislation if the acts of their agents were not subject to revision." 12 Sergeant & Rawle, 345.

⁴⁵ 1 Wheaton, 264, 304, 344.

⁴⁶ 6th Wheaton, 414, 415.

the judicial power should be competent to give efficacy to the constitutional laws of the legislature? That department can decide on the validity of the constitution or law of a State, if it be repugnant to the Constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution? We think it is not. We think that in a government acknowledgedly supreme, with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The propriety of intrusting the construction of the Constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet, been drawn into question."⁴⁷

The same doctrine was held in *Dodge v. Woolsey*⁴⁸ decided in 1855, in which Mr. Justice Wayne, in delivering the opinion, concluded an exhaustive examination of the subject in this language: "Men unite in civil society, expecting to enjoy peaceably what belongs to them, and that they may regain it by the law when wrongfully withheld. That can only be accomplished by good laws, with suitable provisions for the establishment of courts of justice, and for the enforcement of their decisions. The right to establish them flows from the same source, which determines the extent of the legislative and executive powers of the government. Experience has shown that that object cannot be obtained without a supreme tribunal, and one of the departments of the government, with defined powers, in its organic structure, and the mode for exercising them to be provided legislatively. This has been done in the Constitution of the United States. Its framers were well aware of their responsibility to secure justice to the people; and well

⁴⁷ Marshall seems to have forgotten his argument in *Ware v. Hylton*, in which *he was the first*, to draw this power "into question," and argued just contrary to what he decided in his opinion.

⁴⁸ 18th Howard, 331, 354, 355.

knew, as the object of all trials in courts was to determine the suits between citizens, that it could not be done satisfactorily to them, unless they had the privilege to appeal from the first tribunal which had jurisdiction of a suit, to another which should have authority to pronounce definitely upon its merits. (Vattel, 9th chap. on Justice and Polity.) Without such a court the citizens of each State could not have enjoyed all the privileges and immunities of citizens in the several States, as they were intended to be secured by the second section of the fourth article of the Constitution. . . . Without the Supreme Court, as it has been constitutionally and legislatively constituted, neither the Constitution nor the laws of Congress passed in pursuance of it, nor treaties, would be in practice or in fact the supreme law of the land, and the injunction of the judges in every State should be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding, would be useless, if the judges of State courts in any one of the States, could finally determine what was the meaning and operation of the Constitution and laws of Congress, or the extent of the obligation of treaties."

Three years later *Ableman v. Booth*⁴⁰ was decided, wherein Taney, C. J., considered the question at great length. "The Constitution," said he, "was not formed merely to guard the States against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the States then possessed should be seceded to the General Government; and that, in the sphere of action assigned to it, it should be supreme, and strong enough to execute its own laws by its own tribunals, without interruption from a State or from State authorities. And it was evident that anything short of this would be inadequate to the main objects for which the Government

⁴⁰ 21 Howard, 517.

was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one State upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all by appropriate laws to be carried into execution peacefully by its judicial tribunals.

“The language of the Constitution, by which this power is granted is too plain to admit of doubt or to need comment. . . . But the supremacy thus conferred on this Government could not be peacefully maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice of the several States, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken.

. . . Accordingly, this power was conferred on the General Government, in clear, precise and comprehensive terms. It is declared that its judicial power shall extend to all cases in law and equity arising under the constitution, and laws of the United States, and that in such cases, as well as the others there enumerated, this court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as Congress shall make. . . . This judicial power (p. 520) was justly regarded as indispensable, not merely to maintain the supremacy of the laws of the United States, but also to guard the States from any encroachment upon their reserved rights by the General Government. And as the Constitution is the fundamental and supreme law, if it appears that the act of Congress is not pursuant to and within the limits of the power assigned to the Federal Government, it is the duty of the courts of the United States to declare it unconstitutional and void. . . . No one can fail to see, that if such an arbiter had not been provided, in our complicated system of government, internal tranquillity could not have been preserved. . . . In organizing such a tribunal, it is evident that every precaution was taken,

which human wisdom could devise, to fit it for the high duty with which it was intrusted. . . . So long, therefore, as this Constitution shall endure, this tribunal must exist with it, deciding in the peaceful forms of judicial proceedings, the angry and irritating controversies between sovereignties, which in other countries have been determined by the arbitrament of force."

In each of these opinions the power of the court to pass upon the validity of legislative acts, and to declare them unconstitutional or otherwise, is found to exist in the Constitution, and consequently to emanate from the Constitution. Chief Justice Taney went so far as to say, "It was conferred on the General Government, in clear, concise and comprehensive terms."

In *Hepburn v. Griswold*,⁵⁰ Chase, C. J., said, "When a case arises for judicial determination and the decision depends on the alleged inconsistency of a legislative provision with the fundamental law, it is the plain duty of the court to compare the act with the Constitution, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute. This seems so plain that it is impossible to make it plainer by argument. If it be otherwise, the Constitution is not the supreme law, it is neither necessary or useful, in any case, to inquire whether or not, any act of Congress was passed in pursuance of it, and the oath which every member of this court is required to take becomes an idle and unmeaning form."

In *Lent v. Tillson*,⁵¹ Mr. Justice Harlan said: "It is the duty of a county court to hold a statute unconstitutional and void—if such is its opinion. That court is obliged by its oath of office, and in fidelity to the supreme law of the land, to refuse to give effect to any statute that was repugnant to that law, anything in the statute or the constitution of the State to the contrary notwithstanding.

"The duty rests upon all courts, Federal and State," said the same learned Justice, "when their jurisdiction

⁵⁰ 8 Wallace, 603, 611.

⁵¹ 140 U. S. 316, 329.

is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend in no small degree upon the power given the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."⁵²

If there is no such power where is the end? The States are plainly forbidden by the Constitution to do certain things. But suppose they nevertheless do them? And suppose the court of final resort in those States sustains the act, what would be the result if there was no higher authority by which the decision could be reversed? The effect would be so serious, so important and so dangerous to the republic that it is appalling to think of. Surely the position of the court in deciding such questions is dictated by reason, and demanded by justice, and in the language of Chief Justice Gibson, in his *final* opinion is a "necessity." Where there is great reason for doing an act there is also a necessity for doing it. Reason and necessity are frequently the same. That the power is not expressly granted by the Constitution is reasonably certain. That it should have been granted is quite certain, but that it is necessary that it should be exercised is very certain. This being true, which branch of the Government is the most proper to exercise the power? Certainly it could not be the executive branch. The reasons for this are so obvious that they need not be enumerated. Neither could it with propriety be the legislative branch. The reasons for not conferring the power on this department are quite as forceful and obvious as they are for not conferring it upon the executive.

There is no department of the Government where this power can be placed except the judiciary. It must be lodged there, or it cannot be lodged anywhere. That there are objections to the exercise of this power by the courts does not overcome the necessity or benefit of such exercise. It is true, as said by an eminent legal writer,

⁵² Smyth v. Ames, 169 U. S. 466, 527, 528.

that, "a bare majority of a quorum of a court, claims the power to strike with death the unanimous legislation of a Congress composed of hundreds of the best men of the nation."⁸⁸ Be it so. The fairness and force of the criticism is conceded, but there are other faults in the organic structure of our government equally lamentable. Is it more regrettable that a bare majority of a court should pronounce an act of legislation void, than that a bare majority of the Senate or House of Representatives should pass, or fail to pass, a bill involving the interests of millions of people and the expenditure of hundreds of millions of dollars? Human government is not yet so admirably constructed that these apparent imperfections can be eradicated. Is the human mind so equally poised that inequalities are undiscoverable in its operations? The Federal Constitution, when it came from the Convention which framed it, was far less desirable as an organic law, far less worthy of the name and dignity of a Constitution, than it was after the adoption of the Bill of Rights—the first ten amendments. If it is regretted that the Constitution did not confer upon the judiciary the power to declare laws void, was it not equally regrettable that it did not originally contain a provision for trial by jury in civil cases, and does not the regret grow into wonder and astonishment when we consider that the Convention deliberately voted to exclude such a provision from the Constitution? Yet, it was maintained by many eminent men of the Convention, and especially by Mr. Hamilton, that the right of trial by jury was *implied* by the Constitution and, therefore, it was not necessary to *expressly* confer it. So while the power of the judiciary to declare laws void may not be expressly conferred by the Constitution, it is implied from certain provisions of that instrument, and is exercised by the courts in pursuance of that implication. To the exercise of such power there is now but little objection, but there is a settled feeling and conviction that the judiciary is the only reasonable and proper interpreter as to when legislation conflicts with the Constitution.

⁸⁸ Prof. Trickett's article, 41st American Law Review.

Mr. Justice Brewer, said in *Fairbank v. United States*,⁵⁴ "The judicial duty of upholding the provisions of the Constitution as against any legislation conflicting therewith has become now an accepted fact in the judicial life of this nation."⁵⁵

But the courts will not exercise this power, except in cases where it is clear that the legislation in question violates the Constitution,⁵⁶ for it is a settled rule that

⁵⁴ 181 United States, 286.

⁵⁵ Though it does not bear the impress of *judicial* authority there has perhaps never been a more forceful or complete assertion of the right and duty of the judiciary to construe federal legislation and the Constitution than that made by Mr. Webster in his great speech delivered in the Senate January 26, 1830, when he spoke as follows:

"But, Sir, the people have wisely provided, in the Constitution itself, a proper, suitable mode and tribunal for settling questions of constitutional law. There are in the Constitution grants of powers to Congress, and restrictions on these powers. There are, also prohibitions on the States. Some authority must, therefore, necessarily exist, having the ultimate jurisdiction to fix and ascertain the interpretation of these grants, restrictions and prohibitions. The Constitution has itself pointed out, ordained and established that authority. How has it accomplished this great and essential end? By declaring, Sir, *that 'the Constitution and the laws of the United States made in pursuance thereof, shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding.'* This, Sir, was the first great step. By this the supremacy of the Constitution and laws of the United States is declared. The people so will it. No State law is to be valid which comes in conflict with the Constitution, or any law of the United States passed in pursuance of it. But who shall decide this question of interference? To whom lies the last appeal? This, Sir, the Constitution itself decides also, by declaring, *'that the judicial power shall extend to all cases arising under the Constitution, and laws of the United States.'* These two provisions cover the whole ground. They are, in truth, the keystone of the arch! With these it is a government; without them it is a confederation. In pursuance of these clear and express provisions, Congress established at its very first session, in the judicial act, a mode for carrying them into full effect, and for bringing all questions of constitutional power to the final decision of the Supreme Court. It then, Sir, became a government. It then had the means of self protection; and but for this, it would, in all probability, have been now among things which are past." Webster's Works, vol. 3, 334, 335.

⁵⁶ But are not some of the decisions inconsistent with this doctrine? Take, for instance, the cases where legislation has been declared unconstitutional by a bare majority of the justices. In such cases the rule must mean, that the act must appear to be a clear violation of the Constitution to those *justices who think that way*, and that it does not

laws are presumed to be constitutional, and the courts are not justified in holding that the legislative power has been exercised beyond constitutional limits, or in conflict with the restrictions imposed by that instrument, unless such conflict is clear. But if such conflict is clear, and if written constitutions are to be regarded as of value, it is the plain duty of the court to sustain the Constitution, though in so doing the legislative enactment must fall.⁵⁷

Neither will an act be declared void, because it may seem to the court unwise, or unjust. Such elements of legislation are left wholly to the legislative department and the courts will refrain from expressing any opinion on its constitutionality for these reasons.

In *McCrary v. United States*,⁵⁸ White, J., remarked, "Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that in our constitutional system the judiciary was not only charged with the duty of upholding the Constitution but also with the responsibility of correcting every possible abuse arising from

affect the constitutionality of the question, nor render it less clear that an act is unconstitutional if four of the nine justices think the act to be clearly constitutional. Can it be said that an act is a *clear violation* of the Constitution when five justices declare it to be so, and four declare with equal emphasis that it is clearly not so? All doubt must be resolved in favor of the constitutionality of the law, and it must be clear in the mind of the court that the law is unconstitutional. But can this condition exist when four of the justices are equally earnest, equally emphatic, equally persistent and equally contentious in their position that a law is clearly constitutional?

⁵⁷ 181 U. S. 283, 285, 286.

⁵⁸ 195 U. S. 27, 53, 54.

the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation."

So eminent an authority as Judge Story said, the judiciary derives its authority to declare legislation unconstitutional from the supremacy of the Constitution and laws and treaties of the United States.⁵⁹

From the numerous decisions of the Supreme Court sustaining their power to pass upon the constitutionality of Federal legislation there is no appeal. In such a country as the American republic it would be extremely hazardous if there was no body which could decide when national legislation transcended the national Constitution, and though that instrument does not *expressly* confer that power upon the judiciary, it does so by implication and the exercise of such power by the judicial department of the government meets the approval of the great body of the American people.⁶⁰

⁵⁹ Story on the Constitution, vol. 2, 5th ed., sec. 1842.

⁶⁰ It is somewhat strange that though Marshall's opinion in *Marbury v. Madison* established the authority of federal judges to pass upon the constitutionality of federal legislation, no subsequent opinion on this subject made any reference to that opinion until the opinion of Chief Justice Chase in *Hepburn v. Griswold*. Justice Wayne made no reference to it in *Dodge v. Woolsey*, neither did Chief Justice Taney in *Ableman v. Booth* make any reference either to *Marbury v. Madison*, or to Justice Wayne's opinion in *Dodge v. Woolsey*. Chief Justice Chase in *Hepburn v. Griswold* refers to *Marbury v. Madison*, but does not refer to either *Dodge v. Woolsey*, or *Ableman v. Booth*. Justice Harlan makes no reference to *Marbury v. Madison*, *Dodge v. Woolsey*, *Ableman v. Booth*, or *Hepburn v. Griswold*, in his opinion either in *Lent v. Tillson*, or *Smythe v. Ames*. Mr. Justice Brewer, in *Fairbank v. United States* refers to *Marbury v. Madison*, but to no other decisions on the subject. Mr. Justice White in *McCray v. United States* makes no reference to any preceding opinion on this subject.

Mr. Blackburn Esterline in an exceedingly interesting article published in *The American Law Review* in 1904, said that from the beginning of the government only nineteen acts of Congress had been declared unconstitutional by the United States Supreme Court. (*Am. Law. Rev.* vol. 38, 21.) The whole number must be less than twenty-five.

CHAPTER XLV.

FULL FAITH AND CREDIT.

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

We now have to consider those provisions of the Constitution which impose certain reciprocal duties or obligations upon the States in their relations to each other.

Mr. Justice Brown, in his dissenting opinion in *Haddock v. Haddock*, said the object of this clause was to supersede the old doctrine of comity.¹

This is a very old provision in the legislative and constitutional development of the United States. The second Colonial Congress in 1777 passed a resolution that, "Full faith and credit shall be given in each of the States, to the records, acts and judicial proceedings of the courts and magistrates of every other State."²

This was followed by a provision in the Articles of Confederation that, "Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the Courts and magistrates of every other State."³

The provision, as found in the Constitution, is attributable to Gouverneur Morris, but it undoubtedly had its origin in the provisions already cited.

Mr. Madison, in writing of this provision, said: "The power of prescribing, by general laws, the manner in which the public acts, records and judicial proceedings of each State shall be proved, and the effect they shall have in other States, is an evident and valuable improvement on

¹ 201 U. S., 628.

² 2 Journals of Congress.

³ Articles of Confederation, Art. 4.

the clause relating to this subject in the Articles of Confederation. The meaning of the latter is extremely indeterminate; and can be of little importance under any interpretation which it will bear. The power here established may be rendered a very convenient instrument of justice, and be particularly beneficial on the borders of contiguous States, where the effects liable to justice may be suddenly and secretly translated, in any stage of the process within a foreign jurisdiction."⁴

When the Committee of Detail reported its plan for a constitution to the Convention the sixteenth article of the report read: "Full faith and credit shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the courts and magistrates of every other State."⁵

Mr. Williamson moved in the Convention to substitute the clause contained in the Articles of Confederation for the report made by the Committee of Detail.

Mr. Madison said he wished the Legislature might be authorized to provide for the *execution* of judgments in other States, under such regulations as might be expedient. He thought this might be safely done, and would be justified by the nature of the nation.

Mr. Randolph said there was no instance of one nation executing judgments of the courts of another nation, and moved the following proposition: "Whenever the act of any State whether legislative, executive, or judiciary, shall be attested and exemplified under the seal thereof, such attestation and exemplification shall be deemed in other States as full proof of the existence of that act; and its operation shall be binding in every other State, in all cases for which it may relate, and which are within the cognizance and jurisdiction of the State wherein the said act was done."

Mr. Gouverneur Morris moved the following: "Full faith ought to be given in each State, to the public acts, records, and judicial proceedings of every other State. And the Legislature shall, by general laws, determine the proof and effect of such acts, records and proceedings."⁶

⁴ The Federalist No. 42.

⁵ Journal, 480.

⁶ Journal, 625.

The resolution of Mr. Randolph and that of Mr. Gouverneur Morris, together with the article as reported by the Committee of Detail, were then referred to a special committee to consider the question and report their conclusions to the Convention.⁷

Mr. Rutledge, as chairman of the latter committee, reported: "Full faith and credit ought to be given in each State to the public acts, records and judicial proceedings of every other State. And the Legislature shall, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect which judgments obtained in one State shall have in another."⁸

On the following day Mr. Gouverneur Morris moved to amend the report of the special committee by striking out the words "judgments obtained in one State shall have in another," and to insert the word "thereof" after the word "effect," and after a short debate this amendment was carried by a vote of six States to three.

On motion of Mr. Madison the words "ought to," were struck out and "shall" was inserted; and "shall" between "Legislatures" and "by general laws," was struck out, and "may" inserted, *nem con.* As thus amended, the report read: "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, and the Legislature may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." These changes were agreed to without objection.⁹

The resolution then went with the rest of the Constitution to the Committee on Style, and after substituting the word "Congress" for the word "Legislature," that committee reported the resolution as it received it from the special committee, and it was then adopted as part of the Constitution.

This section states the faith and credit which shall attach to the public acts, records and judicial proceedings

⁷ The committee consisted of Mr. Rutledge, Mr. Randolph, Mr. Gorham, Mr. Wilson and Mr. Johnson.

⁸ Journal, 649.

⁹ Journal, 649, 650.

of each State of the Union, in every other State of the Union. It went far towards establishing a feeling of confidence, esteem and respect between the various States. Such confidence, and respect were a necessity if the Union was to succeed. If the States were not to respect the public acts, records and judicial proceedings of each other, there could not exist that confidence among them which was necessary in order to secure a harmonious relationship between them.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Sowers*, Mr. Justice Day said:

"To make effectual the full faith and credit clause of the Constitution, Congress passed the act of May 26th, 1790 (1 Stat. 122, C. 11).

"This act made provision for the authentication of the records, judicial proceedings and acts of the legislatures of the several States, and provided that the same should have such faith and credit given them in every State within the United States as they have by law or usage in the courts of the State from which the records are or shall be taken. This act did not include the territories.

"On March 27, 1804, Congress passed an act extending the provisions of the former statute to the public acts, and records, judicial proceedings, etc., of the Territories of the United States and countries subject to the jurisdiction thereof (2. Stats. 298, C. 56).

"Those statutory enactments subsequently became sections 905 and 906 of the Revised Statutes. Section 905 applies to judicial proceedings, and section 906 to records, etc., kept in offices not pertaining to Courts.

"This language is equally applicable to legislative acts of the Territory, as the passage of such laws is the exercise of authority under the United States (203 U. S. 38-47).

"Section 906 of the Revised Statutes requires every court within the United States to give the same faith and credit to the acts of the Territory as they have by law or usage in the courts of the Territory from which they are taken."¹⁰

Public Acts.—The public acts of a State are the public laws which its Legislature enacts.

¹⁰ 213 U. S., 55-64.

In *Crippen v. Loughton*, it was said: "So far as we have been able to ascertain there is not a word to be found touching the meaning of 'public acts' or relating to the power of Congress to prescribe their effect, in any judgment of the United States Supreme Court." Presumably, however, the words "public acts" mean "public statutes."¹¹

Records and Judicial Proceedings.—The records and judicial proceedings refer to the judgments, orders, decrees, etc., made by courts of record.

In *Aldrich v. Kinney*, it was held, "The words, 'full faith and credit shall be given in each State to the records and judicial proceedings of every other State,' do not comprise that unquestionably clear and definite expression of intention, which precludes construction. The most plenary faith and credit, undoubtedly, must be given; but the sole difficulty consists in precisely ascertaining the subject of the confidence.

"What is intended by 'The records and judicial proceedings of every other State?' These words are sufficiently comprehensive to embrace every judgment *in fact*; and on the other hand, they may rationally be satisfied by a limitation to such judgments only, as are duly rendered, by a court of competent jurisdiction, against those who appeared to defend, or who were legally notified to appear.

"To adopt the former construction was unreasonable and absurd. A more preposterous proposition cannot be advanced, one more contrary to reason and justice, more injurious to the absolute rights of man, or to fundamental principle, than that a person shall be invincibly bound by a judgment obtained against him without notice.

"'Records and judicial proceedings' are such, and such only, as are duly rendered by a court of competent jurisdiction, against those who appear to defend, or who are legally notified to appear."¹²

The courts of the United States will give to the judgments of State courts that same faith and credit which the courts of one State give to the judgments of the courts of the other States.¹³

¹¹ 69 N. H. 540, 548.

¹² 4 Connecticut, 380, 386.

¹³ *Cooper v. Newell*, 173 U. S., 555-567.

Under this section no State court is charged with knowledge of what the laws of another State are. That is, no judicial obligation or duty enjoins upon the courts of one State to have knowledge concerning the laws of another State. But when it becomes necessary, in order to give full faith and credit to a public act of another State, or to ascertain what effect the act has in that State, the law of that State must be proved in a trial as any other fact, for a law is a matter of fact and must be proved as other facts are proved.¹⁴

This section prescribes a rule by which courts, Federal and State should be guided in the progress of a trial relative to the faith and credit which should be given by the court to the public acts, records and judicial proceedings of another State than the one in which the trial is had. It does not include the conduct of individuals or corporations.¹⁵

A party who seeks the benefit of this section must be careful to plead its provisions.¹⁶

Under this provision it is as binding upon a State court to give the same force and effect to a provision of a State Constitution as it is to give such force and effect to its judicial proceedings.¹⁷

This clause does not prevent the trial court from inquiring into the jurisdiction of the court, which rendered the judgment over the subject matter of the suit, or the parties affected by it, or into the facts necessary to give the original court jurisdiction.¹⁸ And the trial court may collaterally impeach a decree or judgment rendered in another State, by proof that the court had no jurisdiction, though the record pretends to show jurisdiction and the appearance of the party.¹⁹ But, the mere construction by a State Court of the statute of another State,

¹⁴ *C. & A. R. R. v. Wiggins Ferry Co.*, 119 U. S., 615-622.

¹⁵ *Minnesota v. Northern Securities Co.*, 194 U. S., 48-72.

¹⁶ *Wabash Railroad Co. v. Flannigan*, 192 U. S., 29-37.

¹⁷ *Smithsonian Institution v. St. John, etc.*, 214 U. S., 19, 28; *Chicago and Alton R. R. v. Wiggins Ferry Co.*, 119 U. S., 615, 622.

¹⁸ *Thorman v. Frame*, 176 U. S., 350-356; *Simmons v. Saul*, 138 U. S., 439; *Reynolds v. Stockton*, 140 U. S., 254; *Cooper v. Newell*, 173 U. S., 555.

¹⁹ *Andrews v. Andrews*, 188 U. S., 14-39; *German Savings Society v. Dormitzer*, 192 U. S., 125-128.

when the court does not question the validity of the statute, does not deny to it the full faith and credit to which the statute is entitled in order to give the trial court jurisdiction.²⁰ The Constitution, by this clause, did not mean to confer any new power on the States, but only to regulate the effect of their jurisdiction over persons and things within their territory. The clause does not make judgments of the States domestic judgments but simply gives a general validity, faith and credit to such judgments as evidence.²¹ Judgments rendered in the territorial courts, and in the Indian courts²² are entitled to the same consideration as judgments rendered in the State courts, and State courts may inquire whether the courts of another State had jurisdiction to render judgment in the suit brought in the former State.²³

The last clause of the article confers upon Congress the power of prescribing how such acts, records and proceedings are to be proved and the effect of such proof, and this method, when once prescribed, is equally binding and effective in every State in the Union; and no State can pass any law on the subject in conflict with the laws which Congress may pass concerning it. In pursuance of the power conferred upon Congress by this article that body, in the second session of the First Congress, passed an act "That the acts of the legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto; that the records and judicial proceedings of the courts of any State shall be proved or admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, Chief Justice, or presiding magistrate, as the case may be, that the said attestation is in due form. And the said records and judicial proceedings authenticated as aforesaid, shall have such faith and credit given them in every court within the United States, as they have by law or usage in the courts of the State from whence the said records are or shall be taken."²⁴

²⁰ *Allen v. Alleghany*, 196 U. S., 458, 464, 465.

²¹ *Cole v. Cunningham*, 133 U. S., 107-112.

²² *Suesenbach et al. v. Wagner*, 41 Minnesota, 108.

²³ *Brown v. Fletcher Estate*, 210 U. S. 82-88.

²⁴ 1 U. S. Statutes at Large, 122.

Congress has made no change in this provision since its enactment, except to amend it to include territories and countries subject to the jurisdiction of the United States.²⁵

Subsequently Congress provided that:

"All records and exemplifications of books, which may be kept in any public office of any State or Territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other State or Territory, or in any such country, by the attestation of the keeper of said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, or secretary of state, the chancellor or keeper of the great seal, of the State, or Territory, or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court, who shall certify, under his hand and the seal of his office, that the said presiding justice is duly commissioned and qualified; or, if given by such governor, secretary, chancellor, or keeper of the great seal, it shall be under the great seal of the State, Territory, or country aforesaid in which it is made. And the said records and exemplifications, so authenticated, shall have such faith and credit given to them in every court and office within the United States as they have by law or usage in the courts or offices of the State, Territory, or country, as aforesaid, from which they are taken."²⁶

Cases under the "Full Faith and Credit" clause.—Suit was brought in the State of Mississippi upon a judgment rendered in Missouri. The defendant pleaded that the cause of action originated in Mississippi; that the controversy had been submitted to arbitration, and that an award was rendered against him; that afterwards, finding him in Missouri, the plaintiff brought suit in that State upon the award; that the trial judge refused to allow him to show the nature of the transaction, which by the laws

²⁵ Rev. Stat., sec. 905.

²⁶ Rev. Stats., sec. 906.

of Mississippi was illegal and void, but on the contrary directed the jury that if they should find that a submission and award had been made and the award was unpaid they should find for the plaintiff. The Supreme Court of the United States by a bare majority held that the judgment on the award was properly rendered, and that an award rendered in one state must be given effect in another, though it was rendered upon a claim which could not have been enforced by the courts of the State where the action originated.²⁷

Records which are authenticated according to the mode prescribed by Congress doubtless prove themselves without the introduction of further evidence. Judgments recovered in one State of the Union, when proved in the courts of another, differ from judgments recovered in a foreign country in no other respect than that of not being re-examinable on their merits, nor impeachable for fraud in obtaining them, if rendered by a court having jurisdiction of the cause and of the parties.²⁸

Mr. Justice Story said: "The Constitution, by this clause, did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can issue upon such judgments, without a new suit in the tribunals of other States. And they enjoy not the right of priority or privilege or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws in their character of foreign judgments."²⁹

A judgment recovered in one State does not have the effect in another State and does not carry with it into that State the efficacy of a judgment upon property or persons which can be enforced by execution; but to give it the force of a judgment in another State, it must be

²⁷ *Fauntleroy v. Lum*, 210 U. S. 230.

²⁸ *Hanley v. Donoghue*, 116 U. S. 1-45.

²⁹ Story on Conflict of Laws, sec. 609; *Thompson v. Whitman*, 18 Wall., 457, 462, 463; *Cole v. Cunningham*, 133 U. S. 107, 112.

made a judgment there. It can only be executed in the latter State as the laws of the latter provide.³⁰

In the important case of *Haddock v. Haddock*,³¹ Mr. Justice White, in delivering the opinion for a bare majority of the Court, announced seven rules or principles growing out of the construction of the "full faith and credit" clause, which are given herewith:

First. The requirement of the Constitution is not that *some*, but that *full* faith and credit shall be given by States to the judicial decrees of other States. That is to say, where a decree rendered in one State is embraced by the "full faith and credit" clause that constitutional provision commands that the other States shall give to the decree the force and effect to which it was entitled in the State where rendered. (Citing *Harding v. Harding*, 198 U. S. 317.)

Second. Where a personal judgment has been rendered in the courts of a State against a nonresident merely upon constructive service and therefore without acquiring jurisdiction over the person of the defendant, such a judgment may not be enforced in another State in virtue of the "full faith and credit" clause. Such personal judgment is void by operation of the due process clause of the Fourteenth Amendment as against a nonresident, even in the State where rendered, and therefore, such a nonresident in virtue of rights granted by the Constitution of the United States may successfully resist, even in the State where rendered, the enforcement of such a judgment. (*Pennoyer v. Neff*, 95 U. S., 174.)

Third. But the principle of the last proposition controls only in judgments *in personam* and has no relation to proceedings *in rem*. That is to say, in consequence of the authority which government possesses over things within its borders there is jurisdiction in a court of a State by a proceeding *in rem* after the giving of reasonable opportunity to the owner to defend, to affect things within the jurisdiction of the court, even although jurisdiction is not directly acquired over the person of the owner of the thing. (*Pennoyer v. Neff*, *supra*.)

³⁰ *McElmoyle v. Cohen*, 13 Pet. 312-325; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 292.

³¹ 201 U. S., 562.

Fourth. The general rule stated in the second proposition is, moreover, limited by the inherent power, which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens. From this exception it results that where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such an action is binding in that State as to such a citizen and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution. (*Maynard v. Hill*, 125 U. S. 190.)

Fifth. Where a husband and wife are domiciled in a State that State has jurisdiction, for good cause, to enter a decree of divorce which will be entitled to enforcement in another State by virtue of the full faith and credit clause. Also where a *bona fide* domicile has been acquired in a State, and a suit is brought by the domiciled party in that State for a divorce, the courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the "full faith and credit" clause. (*Cheever v. Wilson*, 9 Wall., 108.)

Sixth. Where the domicile of matrimony was in a particular State, and the husband abandons his wife and goes into another State in order to avoid his marital obligations, the other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicile of matrimony, and is not therefore, to be treated as the actual or constructive domicile of the wife; hence, the place where the wife is domiciled when so abandoned constitutes her legal domicile until a new actual domicile is by her elsewhere acquired. (*Barber v. Barber*, 21 How. 582.)

Seventh. Where the domicile of a husband is in a particular State, and that State is also the domicile of matrimony, the courts of the State having jurisdiction over the husband may, in virtue of the duty of the wife to be at the matrimonial domicile disregard an unjustifiable absence therefrom, and treat the wife as having her domi-

cile in the State of the matrimonial domicile for the purpose of the dissolution of the marriage, and as a result have power to render a judgment dissolving the marriage which will be binding upon both parties, and will be entitled to recognition in all other States, by virtue of the "full faith and credit" clause. (*Atherton v. Atherton*, 181 U. S., 155.)

The case of *Haddock v. Haddock* grew out of the following facts: The wife sued her husband in New York State in 1899 and secured personal service upon him. The petition charged that the parties were married in 1865, in that State, where they both resided and where the wife continued to reside. It was also charged that the husband soon after the marriage abandoned his wife and failed to support her, though he had property. The answer admitted the marriage, but averred that it was brought about through the fraud of the wife; that soon after the marriage, the parties separated by mutual consent; that the wife had failed through her laches to assert her rights if she had any and was now barred from doing so. It was also set out that in 1881 the husband had obtained a divorce in Connecticut and it was claimed that this divorce was binding on the parties. The case was sent to a referee who refused to admit evidence of the Connecticut divorce, because the court had not obtained jurisdiction over the wife, she being served only by publication, and because she had not appeared in the suit and also because the ground on which the divorce was granted—desertion—was false.

The facts which the referee found were, that the parties were married in New York in 1868, that the wife continued to live there, that the parties never lived together, and that soon after the marriage the husband without justifiable cause left his wife and has since neglected to provide for her. The wife was granted a divorce and alimony. This judgment was affirmed by the Court of Appeals. The case was taken to the Supreme Court of the United States under the "full faith and credit" clause of the Federal Constitution. That court sustained the judgments of the lower courts and held that Connecticut had no jurisdiction to grant a divorce to the husband. The

wife's contentions were sustained and her divorce was affirmed by the Supreme Court of the United States.

The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

Charles Pinckney was the author of this important provision.²² It was reported by the Committee of Detail and inserted in the Constitution without change from the form in which it is found in the plan of the Constitution, which Mr. Pinckney submitted to the Convention. It is one of the important clauses of the Constitution.

It was a principle of English law that a subject of the King could own and dispose of property in any of His Majesty's possessions and that he was entitled to the rights and privileges of the inhabitants of each colony regardless of his actual residence.

Lord Coke decided in Calvin's case that, after the union of England and Scotland, "A man born in Scotland after the accession of King James the First to the English throne, which was in 1603, and during his reign, may hold land in England."²³

The time when the expression, "the privileges and im-

²² More than a third of a century after the Convention which framed the Constitution, Mr. Pinckney was a member of the House of Representatives, when the Missouri Compromise was before that body. In a speech on that subject he said that he was the author of this clause:

"It appears by the Journal of the Convention that formed the Constitution of the United States, that I was the only member of that body that ever submitted a plan of a Constitution completely drawn in articles and sections, and this having been done at a very early stage of their proceedings, the article on which now so much stress is laid, and on the meaning of which the whole of this question is made to turn, and which is in these words: 'The citizens of each State shall be entitled to all privileges and immunities in every State,' having been made by me, it is supposed I must know, or perfectly recollect, what I meant by it. In answer, I say that at the time I drew that Constitution, I perfectly knew that there did not then exist such a thing in the Union as a black or colored citizen, nor could I then have conceived it possible such a thing could ever have existed in it; nor, notwithstanding all that is said on the subject, do I now believe one does exist in it." *Annals of Congress*, (1821), 2 Sess. 16th Cong., 1134.

²³ Coke's Reports, 1 English Reports King's Bench, Reprint Book 6, 379.

munities," became recognized in English law is not known. The writers on English constitutional laws do not seem to mention it. But in the first charter which King James granted to Virginia, which was in 1606, was this expression:

"Also we do, for Us, and our Heirs and Successors, Declare by these Presents, that all and every, the Persons being our Subjects, which shall dwell and inhabit within every or any of the said several Colonies and Plantations, and every of their children, which shall happen to be born within any of the Limits and Precincts of the said several Colonies and Plantations, shall have and enjoy all Liberties, Franchises and Immunities, within any of another Dominions to all intents and purposes, as if they had been abiding and born, within this our Realm of England, or any other of our said Dominions."⁸⁴

In the resolutions which Patrick Henry prepared and presented to the Virginia Assembly in 1765 the first one read, "That the first adventurers, and settlers of this His Majesty's Colony and dominion brought with them . . . all the privileges, franchises and immunities, that have been held, enjoyed, and possessed by the people of Great Britain."⁸⁵

Among the American Colonists who were subjects of the King this principle was respected and observed and a person residing in one colony could own, hold and dispose of property in any other, and was entitled to the benefit of the laws of such colony the same as the citizens thereof. Such was the condition of public sentiment when Congress appointed a committee to prepare Articles of Confederation. The report of that committee, made on the 12th of July, 1776, contained the first formal expression of opinion relating to privileges and immunities of citizens made by the American Congress and was in this language:

"The inhabitants of each colony shall henceforth always enjoy the same rights, liberties, privileges, immunities and advantages, in the other colonies, which the said inhabitants now have, in all cases whatever."⁸⁶

⁸⁴ Poore's Charters, vol. 2, 1891, 1892.

⁸⁵ Wirt's Life of Henry, 74.

⁸⁶ Secret Journals of Congress, vol. 1, 292.

A few days after this report the following resolution was passed by Congress:

"All foreigners who shall leave the armies of his Britannic Majesty in America and chuse to become members of these States; they shall be protected in the free exercise of their respective religions and be invested with the rights, privileges, and immunities of natives as established by the laws of the States."³⁷

In *Douglas v. Stephens*, Chancellor Ridgely said: "So far was the sentiment of community of interest carried that the people of Delaware were often represented in their Legislature and in Congress by persons who resided in Pennsylvania. Even after the adoption of the Declaration of Independence, Mr. McKean, who resided in Philadelphia, was a member of the Delaware General Assembly, and General Dickinson of New Jersey and Mr. _____ of Philadelphia were Representatives of Delaware in the Congress of the United States and Mr. McKean actually signed the Articles of Confederation, on behalf of Dela-

³⁷ Secret Journals of Congress, vol. 2, 292.

The occasion for the passage of this resolution furnishes an interesting view of some occurrences during the Revolutionary War. The resolution in full reads:

"Whereas the Parliament of Great Britain have thought fit by a late act, not only to invite our troops to desert our service, but to direct compulsion of our people, taken at sea, to serve against their country;

"Resolved, therefore, that these States will receive all such foreigners who shall leave the armies of his Britannic Majesty in America, and shall chuse to become members of any of these States; and they shall be protected in the free exercise of their respective religions, and be invested with the rights, privileges and immunities of natives as established by the laws of these States; and, moreover, that this Congress will provide for every such person fifty acres of unappropriated lands in some of these States, to be held by him and his heirs in absolute property." *Journal of Congress*, vol. 2, 292.

During the Revolutionary War, Jefferson, while Governor of Virginia, issued a proclamation reciting the aforesaid resolution, and added:

"I further promise all Foreigners, who shall leave the armies of his Britannic Majesty while in this State and repair to me at this place, that they shall receive from this Commonwealth a further donation of two cows and an exemption, during the present war and their continuance in this State, from all taxes, for the support thereof, and from all militia and military service." *Ford's Writings of Jefferson*, vol. 2, 445.

ware when he presided in the Supreme Court of Pennsylvania."³⁸

Privileges and Immunities of Citizens.—It is important to understand as definitely as possible the meaning of the words, "privileges and immunities," as used in this clause, though the courts have always declined to define them unless compelled to do so in order to properly decide the cause at issue. Mr. Justice Curtis in *Connor v. Elliott*,³⁹ in considering this term said: "It is safer, and more in accordance with the duty of a judicial tribunal, to leave its meaning to be determined, in each case, upon a view of the particular rights asserted and denied therein." In *Ward v. Maryland*,⁴⁰ it was said: "Attempt will not be made to define the words 'privileges and immunities,' or to speak of the rights which they are intended to secure, and protect, beyond what may be necessary to the decision of the case before the court."

Chief Justice Waite, in *McCready v. Virginia*,⁴¹ cited with approval the language of Mr. Justice Curtis in *Connor v. Elliott*, and added: "Citizens of one State are not invested by this clause of the Constitution with any interest in the common property of the citizens of another State." Mr. Justice Harlan, in *Blake v. McClung*,⁴² said: "This court has never undertaken to give any exact or comprehensive definition of the words 'privileges and immunities' in Article 4 of the Constitution."

The word "privilege" as used in this clause signifies a peculiar advantage, exemption, or immunity—such privileges as would be common or the same in every State.⁴³ It is defined to be exemption from such burdens as others are subjected to.⁴⁴

Immunity is defined to be, an exemption from serving in an office, or performing duties which the law generally requires other citizens to perform.⁴⁵

The Articles of Confederation contained this provision:

³⁸ 1 Del. Ch. 465-468.

³⁹ 18 Howard, 593.

⁴⁰ 12 Wallace, 418, 430.

⁴¹ 94 U. S. 391-395.

⁴² 172 U. S. 239, 248.

⁴³ *Douglas v. Stephens*, 1 Del. Ch. 465-476.

⁴⁴ Bouvier.

⁴⁵ Bouvier.

"The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively, provided, etc."⁴⁰

Mr. Madison, in No. 42 of the *Federalist*, commented on this provision. His discussion of it will be found at page 613 of the first volume of this work, where it is quoted at length.

When the Constitutional Convention met, the men who composed it were familiar with the principle and language we are considering and both were older than American constitutional liberty. So appropriate was it that both should be incorporated in the Constitution that the provision was adopted by the Convention by all the States voting for it except South Carolina,⁴¹ which voted against it, and Georgia, whose vote was divided. Without change it was accepted by the Committee on Style and became part of the Constitution, being one of the very few pro-

⁴⁰ Articles of Confederation, Art. 4.

⁴¹ Journal, 624.

It is singular Mr. Pinckney's own State should have been against him on this provision. In a speech delivered in the Convention Mr. Pinckney said:

"The Federal Government should possess the exclusive right of declaring on what terms the privileges of citizenship and naturalization should be extended to foreigners. At present the citizens of one State are entitled to the privileges of citizens in every State. Hence it follows, that a foreigner, as soon as he is admitted to the rights of citizenship in one becomes entitled to them in all. The States differed widely in their regulations on this subject. I have known it already productive of inconveniences, and think they must increase. The younger States will hold out every temptation to foreigners, by making the admission to offices less difficult in their governments, than the older. I believe in some States, the residence which will enable a foreigner to hold any office, will not in others entitle him to vote. To render this power generally useful, it must be placed in the Union, where alone it can be equally exercised." *Moore's American Eloquence*, vol. 1, 368.

visions which did not undergo some change during the proceedings of the Convention.

The framers of the Constitution had the same desire to cement and perpetuate the feeling of good will and confidence among the citizens of each State and to secure their equal rights in the other States which actuated the framers of the Articles of Confederation, and the members of the Colonial Congress. This was shown by the fact that the provision we are considering was adopted without debate and by a practically unanimous vote by the Constitutional Convention.

Had this provision been omitted, State comity would then have been depended upon to secure that friendly relationship which exists between such citizens and the enforcement of such rights as this provision secures. Now a citizen of a State or of the United States need not rely upon State comity or national legislation for the enjoyment of those privileges and immunities which have formed so important a part of our constitutional history and which are granted to him by that instrument. They are given him by an authority which State comity cannot reach or national legislation influence. The great principle has become a part of the organic law of the nation and is written into the letter and spirit of the Constitution. What had been a cherished principle of State comity has become a constitutional provision.

There can be little doubt, when we consider the purpose which influenced the Convention to insert this clause, that the framers of the Constitution meant that the citizens of each State should be entitled in the other States to the legal rights of the citizens of those States. Had the clause read in that way it would have been more easily understood. Certainly the ultimate purpose of the provision is to secure to the citizens of any particular State whatever rights they may have in other States of the Union.

The rights which the clause was intended to secure are those of the citizens of the States. It does not undertake to confer any right, privilege or immunity on any one not a citizen of a State, as distinct from citizens of the United States. No mention or reference is made to citizens of the United States. If such a distinction came into the mind of the Convention or of any member of it, there is

nothing in this clause, or in any clause of the original Constitution which indicates it. Citizenship of the United States, as separate from citizenship of the States, does not seem to have been contemplated at that time. Certainly the language of this clause can only be predicated on citizenship of the States.⁴⁹

In *Brittle v. the People*,⁵⁰ Chief Justice Mason, in his dissenting opinion, said: "The words 'privileges and immunities' have been treated as synonymous with rights." And Denio, J., in *Lemmon v. The People*,⁵¹ in referring to the privileges and immunities of citizens under this clause, observed: "The meaning is, that in a given State, every citizen of every other State shall have the same privileges and immunities—that is, the same rights—which the citizens of that State possess." -

In *ex parte Coupland*,⁵² it was held: "The word 'privilege' properly signifies an exemption from some duty, and immunity from some general burden or obligation, a right peculiar to some individual or body."

This clause refers only to privileges and immunities of citizens of the States.

The privileges and immunities embraced by this section are those belonging only to citizens of the States.

This provision came before the Supreme Court of Delaware at a very early period and it was held: "The only reasonable construction to be given to this clause is that of placing all the citizens of the United States on the same footing, and extending to them a perfect equality in their rights, privileges and immunities. If one citizen has

⁴⁹ Mr. Hannis Taylor after quoting this constitutional provision says, "Beyond that point the framers of the more perfect Union were not prepared to go. They did not attempt to do more than establish an interstate citizenship to which they imparted the qualities of denying to every State the right to discriminate in favor of its own citizens as against those of any other State. There was no attempt whatever, either in the Constitution itself or in any act of Congress passed after its adoption, to establish or define citizenship of the United States as such, as a distinct and independent thing from State citizenship." *Origin and Growth of the English Constitution*, 75.

⁵⁰ 2 Nebraska, 239.

⁵¹ 20 New York, 608.

⁵² 26 Texas, 420.

a privilege to which others are not entitled then they are not entitled to all privileges and immunities of citizens in the several States.

"It was further held, that a privilege cannot be extended so far as that no particular advantage can be given by any State to its own citizens, but such as must be extended to all citizens in every State in the Union; because, the privileges secured are not such as are given to citizens in one or more States by the State laws, but must be such as the citizens in the several States, that is, in *all* the States, are entitled to. The great object to be attained was to prevent a citizen in one State from being considered an alien in another State."

"Our situation antecedent to the formation of the first General Government, in 1778, rendered such a provision necessary; and accordingly a similar clause was inserted in the Articles of Confederation then adopted, from which the second section of the Fourth Article of the Constitution of the United States was probably taken. The privileges and immunities are not enumerated or described; but they are all privileges common in the Union—which certainly excludes those privileges which belong only to citizens of one or more States, and not to those in every other State."⁵³

The clause was first considered in the Federal Courts in the case of *Corfield v. Coryell*,⁵⁴ in 1823, where Mr. Justice Washington defined privileges and immunities, and the courts without hesitation have accepted and followed his definition. In his opinion he says:

"The inquiry is, what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, *fundamental*; which belong, of right, to the citizens of all free governments; and which have at all times been enjoyed by the citizens of the several States which compose this union, from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general

⁵³ Douglas, *Adm'n., v. Stephens*, 1 Delaware Chancery, 465, 476, 477.

⁵⁴ Washington, C. C., 380, 386.

heads; protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole. The right of a citizen of one State to pass through, or to reside in any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; to claim the benefit of the writ of habeas corpus; to institute and maintain actions of any kind in the courts of the State; to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the State; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the State in which it is to be exercised. These, and many others which might be mentioned, are, strictly speaking, *privileges and immunities*, and the enjoyment of them by the citizens of each State, in every other State, was manifestly calculated (to use the expressions of the preamble of the corresponding provision in the old Articles of Confederation), 'the better to secure and perpetuate mutual friendship and intercourse among the people of the different States of the Union.' "

These privileges and immunities are: first, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; second, the right of a citizen of one State to pass through, or reside in, any other State, for purposes of trade, agriculture, professional pursuits, or otherwise; third, to claim the benefit of the writ of *habeas corpus*; fourth, to institute and maintain actions of any kind in the courts of the State; fifth, to take, hold and dispose of property; sixth, exemption from higher taxes or impositions than are paid by the other citizens of the State; seventh, the elective franchise as regulated and established by the laws or constitution of the State in which it is to be exercised. They are fundamental and arise from the fact of citizenship and nothing else, and belong

to the citizen as of right. The list does not, however, include all privileges and immunities which citizens of the States were entitled to at that time, for the opinion says, "There were many others which might be mentioned," and the number has since been greatly enlarged, for it must appear self-evident that a great and powerful people, living in the broadest current of national life and activity, in the course of almost a century would of necessity create new privileges and immunities, so that the number would increase with the development of national resources, growth and strength. These new privileges and immunities of citizens of the States are no less fundamental than those mentioned in *Corfield v. Coryell*.

Many of them have been grouped by an eminent writer on the Constitution,⁵⁵ as follows:

"Privileges, in general sense, including both those under State and Federal citizenship, include the right to go and come through all the territory under the jurisdiction of the United States on lawful business or pleasure; to keep and bear arms; to make contracts; to acquire, hold and dispose of property; to sue and have admission to the courts and the benefit of *habeas corpus*, and other legal remedies and the public records and books; to carry on lawful business, to use the mails, railroads, telegraphs, telephones, and other common carriers of the citizen's person, goods, or intelligence; to use public highways and easements; to be exempt from unreasonable searches of his domicile or premises, or seizure of his property; to enjoy light and air; to marry and have family; to seek happiness and pleasure; to worship God, and attend public worship of God and other public assemblages of the people; to entertain what religious opinions conscience dictates, and worship accordingly; to witness public demonstrations, to attend theaters and other public amusements; to obtain education in letters, music, art, profession, science, mechanics, or the like; to attend the public schools, no matter by what name known, common, graded or normal schools, academies, colleges or universities; to go to foreign lands; to peaceably assemble and confer upon religion, politics or business, to write and

⁵⁵ Brannon on the Fourteenth Amendment, 65.

express opinions upon public matters of business or religion; to petition the Government for redress of grievances; freedom of the press."

Others could be added to the list, but it would be useless to do so. They embrace almost everything which conduces to the enjoyment of life and the successful conduct of business, and all are based upon the rights of citizenship, and are such as legitimately flow from that relation.

Illustrations of this clause.—An act of the General Assembly of Virginia provided that before any insurance company not incorporated in that State could carry on its business there it must first obtain a license for that purpose; and that such license should not be granted it until after the company had deposited with the State treasurer certain specified bonds to a certain amount. A later act declared that no person "without a license authorized by law, should act as agent for any foreign insurance company" under a penalty of not less than fifty nor more than five hundred dollars for each offense, etc. Samuel Paul, who resided in that State, became the agent of insurance companies incorporated in other States which desired to carry on insurance in Virginia. Following the statute, Paul filed with the proper official of the State his authority from the aforesaid companies to act as their agent. Then he applied to the proper officer for a license to act as such agent within the State, and offered to comply with all the requirements of the statute concerning foreign insurance companies except the provision requiring a deposit of bonds with the State treasurer. He did not comply with this provision, neither did the companies which he represented, and his license was refused upon that ground, but he undertook to act in Virginia as the agent for the foreign companies without license, and issued a policy in the name of one of such companies to a citizen of Virginia. For violating the statute he was indicted, tried and convicted, and on error to the supreme court of the State the judgment was affirmed.

The case went to the Supreme Court of the United States, as it was claimed that the act of the Virginia General Assembly was in violation of the clause of the

Federal Constitution under consideration. Mr. Justice Field⁵⁶ said (p. 177):

"The term citizen as used in the clause in question, applies only to natural persons, members of the body politic, owing allegiance to the State, not to artificial persons created by the legislature, and possessing only the attributes which the legislature has prescribed."

Again (p. 180):

"It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this.

"Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

"But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can have no such operation, except by the permission, express or implied, of those States. The special privileges which they

⁵⁶ Paul v. Virginia, 8 Wallace, 168, 177, 180.

confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given."

Ward v. Maryland,⁵⁷ was a case where a statute of Maryland provided that all persons engaged in the business of trading resident in that State should secure a license for which they were to pay a certain sum not to be less than twelve dollars, and not to exceed one hundred and fifty dollars per month, according to the business in which they were engaged. The same statute made it a criminal offense for any nonresident person to engage in business in said State by selling goods, wares or merchandise other than certain exempted articles without first obtaining a license to do so, for which he was required to pay the sum of three hundred dollars.

This was held a violation of the clause in question. Delivering the opinion of the court, Mr. Justice Clifford said (p. 430):

"Beyond doubt the words 'privileges and immunities' are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business without molestation; to acquire personal property, to take and hold real estate, to maintain actions in the courts of the State, and to be exempt from any higher taxes or excises than are imposed by the State upon its own citizens.

"Comprehensive as the power of the States is to lay and collect taxes and excises, it is nevertheless clear, in the judgment of the court, that the power can not be exercised to any extent in a manner forbidden by the Constitution; and inasmuch as the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, it follows that the defendant might lawfully sell, or offer or expose for sale, within the district described in the indictment, any goods which the permanent residents of the State might sell, or offer or expose for sale in that dis-

⁵⁷ 12 Wallace, 418.

trict, without being subjected to any higher tax or excise than that exacted by law of such permanent residents."

In the Slaughter House Cases⁵⁸ Mr. Justice Miller approved the definition of privileges and immunities as given by Mr. Justice Washington in *Corfield v. Coryell*, and also approved the decision in *Ward v. Maryland*, and said:

"The description, when taken to include others not named, but which are of the same general character, embraces nearly every civil right for the establishment and protection of which organized government is instituted."

Again, quoting from *Paul v. Virginia*, and citing the clause in question, he said, (p. 77):

"The constitutional provision did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the State governments over the rights of its own citizens. Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

The clause established a general citizenship among the citizens of the several States.—In *Cole v. Cunningham*,⁵⁹ the court said:

"The intention of section 2 of article 4 was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, and this includes the right to institute actions."

In *Blake v. McClung*,⁶⁰ Mr. Justice Harlan after having reviewed the above cases, said:

"The foundation upon which these cases rests cannot, however, stand, if it be adjudged to be in the power of one State, when establishing regulations for the conduct

⁵⁸ 16 Wallace, 76.

⁵⁹ 133 U. S., 113, 114.

⁶⁰ 172 U. S., 252, 256.

of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other States."

Again (p. 256):

"We must not be understood as saying that a citizen of one State is entitled to enjoy in another State *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State. For instance, a State cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people; but it may require a nonresident, although a citizen of another State, to give bond for costs, although such bond be not required of a resident. Such a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States. So, a State may, by a rule uniform in its operation as to citizens of the several States, require residence within its limits for a given time before a citizen of another State who becomes a resident thereof shall exercise the right of suffrage or become eligible to office. It has never been supposed that regulations of that character materially interfered with the enjoyment by citizens of each State of the privileges and immunities secured by the Constitution to citizens of the several States. The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the rights that commonly appertain to those who are a part of the political community known as the People of the United States, by and for whom the Government of the Union was ordained and established."

This clause does not include corporations.—The history of this clause shows that the term "citizens" has always been used as representing persons or inhabitants of a State, and that it does not include corporations. While corporations may be citizens of a State, for some purposes they are not citizens within the meaning of this clause.

When the language from which this provision was taken was used by the Colonial Congress and afterwards by the Articles of Confederation, few if any corporations had been formed within the territory now known as the United States and it is therefore reasonable to assume they were not within the contemplation of the framers of this language when it was used in the Colonial Congress, in the Articles of Confederation, or in the Constitution.

In *Blake v. McClung*, *supra*, it was held: "A corporation is to be deemed, for some purposes, a citizen of a State under whose laws it was organized, but it is equally well settled and we now hold, that a corporation is not a citizen within the meaning of the constitutional provision, that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.'"⁶¹

A law of Ohio provided, "Whenever the *death of a citizen of this State* has been or may be caused by a wrongful act, neglect or default in another State, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such State, territory or foreign country, such right of action may be enforced in this State within the time prescribed for the commencement of such action by the statute of such other State, territory or foreign country."

A citizen of Pennsylvania in the employment of a railroad company, having met his death in the State of Pennsylvania, an action was brought in the State of Ohio for the recovery of damages. The Supreme Court of that State held that under the statute in question the action could not be maintained.

In reviewing this judgment the Supreme Court of the United States, in *Chambers v. Baltimore & Ohio Railroad*,⁶² held: "The courts of Ohio were open in such cases to plaintiffs who were citizens of other States if the deceased was a citizen of Ohio; they were closed to plain-

⁶¹ In an opinion rendered by Mr. Justice Curtis, after his retirement from the United States Supreme Court, he held this clause did not include corporations, but that it did include a partnership composed of citizens of different States. *Life and Writings of B. R. Curtis*, vol. 1, 294, 295.

⁶² 207 U. S. 142-149.

tiffs who were citizens of Ohio if the deceased was a citizen of another State. So far as the parties to the litigation are concerned, a State by its laws made no discrimination based on citizenship, and offered precisely the same privileges to citizens of other States which it allowed to its own. Consequently the statute did not violate the privileges and immunities conferred by the Constitution of the United States; and the right to bring suit and defend against a suit in a State court is a privilege and immunity within the provisions of that clause of the Federal Constitution."

Privileges and immunities conferred by the Federal Constitution are not denied to owners of mines by the enactment of a statute by a State which provides that only experienced mine managers and examiners shall be employed and which requires the managers and examiners of mines to provide safe places for the employees.⁶³

⁶³ *Wilmington Star Mining Co. v. Fulton*, 205 U. S., 60, 73.

CHAPTER XLVI.

SURRENDER OF FUGITIVES.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

The doctrine that fugitives from justice should be surrendered by the State to which they fled, and in which they are found, is of early date in American history. The eighth Article of the New England Confederation dated the 29th of August, 1643,¹ provided:

“It is also agreed that if any servant runn away from his master into any other of these confederated Jurisdiccions. That in such Case, vpon the Certyficate of one Majistrate in the Jurisdiccon out of which the said servant fled, or upon other due prooffe, the said servant shalbe deliuered either to his Master or any other that pursues and brings such Certificate or prooffe. And that vpon the escape of any prisoner whatsoever or fugitiue for any criminal cause, whether breaking prison or getting from the officer or otherwise escaping, upon the certificate of two Majistrats of the Jurisdiccon out of which the escape is made that he was a prisoner or such an offender at the tyme of the escape. The Majistrates or some of them of that Jurisdiccon where for the present the said prisoner or fugitive abideth shall forthwith graunt such a warrant as the case will beare for the apprehending of any such person, and the delivery of him into the hands of the officer or other person that pursues him. And if there be help required for the safe returneing of any such offender, then it shalbe graunted to him that craves the same, he paying the charges thereof.”

¹ Preston's Docs. Illust. Am. History, 92, 93.

A resolve of the second Colonial Congress passed in 1777 read: "If any person guilty of, or charged with treason, felony, or other high misdemeanor, in any State, shall flee from justice or be found in any of the United States he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense."²

The Articles of Confederation provided: "If any person guilty of, or charged with, treason, felony, or other high misdemeanor, in any State, shall flee from justice, and be found in the United States he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up, and removed to the State having jurisdiction of his offense."³

Mr. Pinckney's plan of a Constitution was the only one which contained a provision on this subject, and it was substantially adopted by the Convention.

The Committee of Detail reported: "Any person charged with treason, felony, or high misdemeanor, in any State, who shall flee from justice and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offense."⁴ The Convention struck out the words "high misdemeanor," and inserted the words "other crime," in order to embrace all proper cases, as it was thought there was some doubt whether the expression "high misdemeanor" did not possess too limited a meaning. The article was then passed without opposition.⁵

² 2 Journal of Congress, 325.

³ Articles of Confederation, art. 4.

⁴ Journal, 460.

⁵ Journal, 625.

Mr. Gouverneur Morris and Mr. Randolph offered the following on the subject of treason in the Convention:

"Whereas it is essential to the preservation of liberty to define precisely and exclusively what shall constitute the crime of treason, it is therefore ordained, declared, and established, that, if a man do levy war against the United States within their territories, or be adherent to the enemies of the United States within the said territories, giving them aid and comfort within their territories or elsewhere, and thereof be provably attainted of open deed by the people of his condition, he shall be adjudged guilty of treason." 5th Elliot, 449.

The word "charged" in this clause means any proceeding which a State might see fit to adopt by which a formal accusation is made against an alleged criminal. A party is charged with a crime when an affidavit is filed against him setting forth the commission of an offense and a warrant is issued for his arrest, whether a final trial may or may not be had upon such accusation. The word was used by the framers of the Constitution in its broad signification.*

Treason against a State.—The words, "A person charged in any State with treason," strongly imply that, in contemplation of the framers of the Constitution, treason against a State is a crime. This can not be unless there can be treason against a State.

The question is one of importance and writers on constitutional law seem to entertain contrary opinions concerning it. Mr. Pinckney's plan defined treason to consist in levying war against the United States, or any of them, or adhering to their enemies. The report of the Committee of Detail used the same language.

When this definition was being considered by the Convention, Mr. Gouverneur Morris said: "In case of a contest between the United States and a particular State, the people of the latter must, under the disjunctive terms of the clause, be traitors to one or the other authority."

Dr. Johnson contended that treason could not be against both the United States and individual States, being an offense against the sovereignty, which can be but one in the same community. Mr. Madison remarked that as the definition of treason was against the United States, it would seem that the individual States would be left in possession of a concurrent power, so far as to define and punish treason, particularly against themselves, which might involve double punishment. Mr. Wilson and Doctor Johnson then moved that the words "or any of them" after "United States," be struck out, in order to remove the embarrassment; which was agreed to, *nem. con.*

Mr. Madison said this did not remove the embarrassment. The same act might be treason against the United States, as here defined, and against a particular State, according to its law.

* Matter of Strauss, 197 U. S. 324, 331.

Doctor Johnson still thought there could not be treason against a particular State.

Colonel Mason said—The United States will have a qualified sovereignty only. The individual States will retain a part of sovereignty. An act may be treason against a particular State, which is not so against the United States.⁷

Judge Story's comment is: "A State cannot take cognizance or punish the offence of treason against the United States, whatever it may do in relation to the offense of treason, committed exclusively against itself; if, indeed, any case can, under the Constitution, exist, which is not at the same time treason against the United States."⁸

An eminent author says: "The point has never been definitely settled, and is one of no small difficulty. Without some other definition, however, it is not easy to imagine a case of treason against a State which would not also be treason against the United States."⁹

The statute of Ohio provides: "Whoever levies war against this State or the United States, or knowingly adheres to the enemies of either, giving them aid and comfort, is guilty of treason against the State of Ohio, and shall be imprisoned in the penitentiary for life."¹⁰ And the Constitution of the State prohibits the Governor from pardoning one convicted of treason, but says that upon conviction for treason, he may suspend the execution of the sentence, and report the case to the General Assembly, at its next meeting, when the general assembly shall either pardon, commute the sentence, direct its execution, or grant a further reprieve.¹¹

In many of the States treason is made a crime against the State.

Every citizen residing in a State whose Constitution or statutes contains this provision becomes subject to two separate and independent sovereignties concerning treason. It is declared by those writers who maintain there can be no treason against a State that this position is inconsis-

⁷ Journal, 563-567.

⁸ 2 Story on Constitution, sec. 1301.

⁹ Walker's American Law, 162.

¹⁰ R. S. of Ohio, 6806.

¹¹ Constitution of Ohio, art. 3, sec. 11.

ent; that there can be but one sovereignty against which treason can be committed, and they also, say that, if a person can be convicted of treason against a State, a very serious and embarrassing question may arise. In fact, they say such a question did arise in the case of the late rebellion in the United States, namely to which sovereignty would a citizen owe his allegiance? If the conduct of the citizens of a State amounted to treason against the Union, a citizen of that State who adhered to the Union would be guilty of treason to his State, while if he adhered to his State he would be guilty of treason to the General Government.

Luther Martin, in his celebrated letter to the Legislature of Maryland relative to the proceedings of the Convention which adopted the Federal Constitution, of which he was a member, referred to this precise question and said:

“The time may come when it shall be the duty of a State, in order to preserve itself from the oppression of the General Government, to have recourse to the sword; in which case, the proposed form of government declares, that the State, and every one of its citizens who acts under its authority, are guilty of a direct act of treason; reducing, by this provision, the different States to this alternative,—that they must tamely and passively yield to despotism, or their citizens must oppose it at the hazard of the halter, if unsuccessful; and reducing the citizens of the State which shall take arms to a situation in which they must be exposed to punishment, let them act as they will—since, if they obey the authority of their State government, they will be *guilty of treason against the United States*; if they join the General Government, they will be guilty of treason against their own State.¹²

“To save the citizens of the respective States from this

¹² Mr. Bryce says there can be treason against a State, though instances of it have been rare.

“A State commands the allegiance of its citizens, and may punish them for treason against it. The power has rarely been exercised, but its undoubted legal existence had much to do with inducing the citizens of the Southern States to follow their governments into secession in 1861. They conceived themselves to owe allegiance to the State as well as to the Union, and when it became impossible to preserve both, because the State had declared its secession from the Union, they might hold the earlier and nearer authority to be paramount.

disagreeable dilemma, and to secure them from being punishable as *traitors* to the *United States*, when acting expressly in obedience to the authority of their own State, I wished to have obtained, as an amendment to the third section of this article, the following clause:—

*“Provided, That no act or acts done by one or more of the States against the United States, or by any citizen of any one of the United States, under authority of one or more of the said States, shall be deemed treason, or punished as such; but in case of war being levied by one or more of the States against the United States, the conduct of each party towards the other, and their adherents respectively, shall be regulated by the laws of war and nations.”*¹³ But this proviso was rejected by the Convention.”

Von Holst says: “This question appeared on a broad stage during the Civil War. Many Southerners, like General Robert E. Lee and Alexander H. Stephens, the Vice-President of the Confederate States, were opposed to secession, but, after secession was once ordained by their respective States, they declared themselves not only willing to go with their States, but bound to go with them, unless they were to be guilty of treason, for they owed allegiance to their respective States, and indeed only to them.” “The Federal Government,” continues the author, “naturally refused to admit this, and Chief Justice Chase, in *Shortridge v. Macon*,^{13a} decided that no ‘rebel’ could defend himself from the charge of treason by pleading the ordinances and commands of his State. Logically, however, this question, on account of its connection with other problems of constitutional law, brought to the surface by the Civil War, leads to a whirlpool of conflicting conclusions.”¹⁴

Judge Tucker, in analyzing the clause of the Constitution which refers to treason against the United States, said:

Allegiance to the States must now, since the war, be taken to be subordinate to allegiance to the Union. But allegiance to the State still exists; treason against the State is still possible. One cannot think of treason against Warwickshire or the department of the Rhone.” *Bryce's American Commonwealth*, Vol. 1, 407.

¹³ *Elliot's Debates*, Vol. 1, 382, 383.

^{13a} *Chase's Decisions*, 136.

¹⁴ *Von Holst's Constitutional Law of the United States*, 157.

"Treason against a State by this clause is left to its own definition; unless any should doubt whether this was intended, a reference to the subsequent clauses will remove it." Then he quotes the clause now under consideration and adds, "This clearly refers to a treason against a State, of which it alone could have jurisdiction."¹⁵

On the contrary, Jameson has stated the doctrine to be: "Treason is a crime against sovereignty, a violation of one's allegiance. Hence, there is really no such thing as treason against any political body in the Union but the United States. If a State, by its courts, punishes treason, it must be not as treason against itself, but as treason against the Union; and, in this view, the propriety of that State legislation which defines treason against the State and affixes to it particular penalties is doubtful."¹⁶

Andrews says, "There can be no treason against a State, that if a State punishes treason, it must be not as treason against itself, but as treason against the Union."¹⁷

In 1814 certain persons were indicted in the State of New York. The indictment alleged that they were citizens of the State of New York and of the United States of America and that they adhered to and gave aid and comfort to the enemy, by supplying them with provisions of various kinds, on board a public ship of war, upon the high seas. It was attempted by the prosecution to support the averments of the indictment under a New York statute, which declared treason against the people of that State to consist in levying war against the people of the State, within the State, or adhering to the enemies of the people of the State, giving to them aid and comfort in the State or elsewhere. It was claimed by the prosecution that unless the language of the statute applied to the case of the defendants then on trial that it was nugatory. But the Supreme Court of the State in *People v. Lynch*,¹⁸ said, that this by no means follows, "for there can be no doubt that such a state of things might exist, as that treason against the people of this State might be com-

¹⁵ Tucker on the Constitution, 618, 619.

¹⁶ Jameson on Constitutional Conventions, 56.

¹⁷ Andrews' Manual of the Constitution, 209.

¹⁸ 11 Johnson's Reports, 549, 552.

mitted. This might be by open and armed opposition to the laws of the State, or a combination and forcible attempt to overturn or usurp the government." But such circumstances did not exist in that case, said the court. Great Britain was not at war with the State of New York. It was held that as the defendants were not charged with treason against the United States and as the United States was at war with Great Britain and not the State of New York, the indictment could not be supported.

A case of historical interest arose in Rhode Island under the following circumstances. That State until 1843 retained the Constitution which Charles II granted it in 1663. Under this charter suffrage was limited to those who owned real estate, and to the eldest sons of such persons. Great opposition developed to this system and a strong party grew up which favored a more liberal Constitution. A convention was finally held which adopted a new Constitution for the State and provided for the election of new State officers. This Constitution was ratified by a majority of the electors of the State, and at an election held under its provision, Thomas W. Dorr was elected Governor on April 18, 1842. Samuel W. King, who was elected Governor on the same day under the old charter form of government, refused to yield the office to Dorr, and this resulted in each party resorting to arms.

The adoption of the new Constitution had the effect of weakening Dorr's strength, and his supporters largely abandoned him. He was subsequently indicted for treason against the State, but fled to Connecticut and then to New Hampshire. He subsequently returned to Rhode Island, where he was arrested, tried and convicted and on June 25, 1844, was sentenced to be imprisoned for life.

In 1847 he was released under a general amnesty act, and restored to his civil rights in 1851.¹⁹

¹⁹ Ten years after Dorr's conviction the following act was passed by the legislature of the State:

"Whereas, The General Assembly of this State hath from time to time exercised the powers conferred upon it by the charter of King Charles the Second, 'to alter, reverse annul or pardon, under their common seal or otherwise, such fines, mulcts, imprisonments, sentences, judgments and condemnations as shall be thought fit:'

"And, whereas, The same powers were continued to the General Assembly under the existing Constitution of this State by the terms

These are believed to be the only cases where the question has been presented to the Supreme Court of a State. (See Appendix No. 15.) They establish the basic principles of the doctrine of treason against a State. They hold

thereof, which provide 'that the General Assembly shall continue to exercise the powers they have heretofore exercised, unless prohibited by this Constitution;' and by the provision that 'the Supreme Court established by this Constitution shall have the same jurisdiction as the Supreme Judicial Court' theretofore existing:

"And, whereas, an alleged political offense, for which a judgment has been rendered in favor of the State, may in certain cases furnish a proper occasion for the exercise of such high powers:

"And, whereas, upon the trial of Thomas Wilson Dorr for the alleged crime of treason, there was an improper and illegal return of jurors in this, that one hundred and seven jurors from one political party were designedly selected by the sheriff, in part with the aid and assistance of persons acting in behalf of the State, and only one juror from the other political party, and the accused was tried in a county other than that in which he resided, and he was allowed but two days with any, and but few hours with some of the panel of jurors, in which to inquire as to their disqualifications or obtain proof thereof, and was not allowed after the peremptory challenge of several such jurors, and after obtaining proof of such disqualifications, to withdraw said peremptory challenges, and to challenge said jurors for cause, or to have a new trial in consequence thereof:

"And, whereas, the court denied the jury the right to pass upon questions of law, though said court had previously, in accordance with the common law, held that the jury might in criminal cases 'take upon themselves the responsibility of deciding questions of law;' and the accused was not allowed to show in justification or in explanation of his motives or intent, that he acted under a constitution which had been adopted by a large majority of the people of the State, and in accordance with what he deemed to be his right and duty in consequence thereof:

"And, whereas, the said Thomas Wilson Dorr was thereby wrongfully convicted:

"And, whereas, it is desirable for the best interests of this State, that the wrongs thereby inflicted upon said Dorr, and upon the people of the State, should be redressed, and that the animosities created by the civil commotions which preceded and accompanied said trial should cease and determine:

"And, whereas, it has been the custom of our English forefathers (but for which there hath been happily no occasion heretofore in the history of this country), whenever judgments for treason have been thus illegally and wrongfully obtained, to reverse by act of Parliament such judgments, and to direct, to the end that justice be done to those who have been thus convicted, that the records thereof be cancelled or destroyed:

"It is enacted by the General Assembly as follows:

"Section 1. The judgment of the Supreme Court, whereby Thomas

that there can be treason against a State of the Federal Union, and that open and armed opposition to the laws of the State, or a combination and forcible attempt to overturn or usurp the State government, giving aid and comfort to the enemies of a State or supplying them with provisions amounted to treason against a State.

A similar view must have been taken by the conventions which framed the constitutions for most of the States of the Union, or else the provisions of such constitutions on the subject of treason was a vain and useless insertion in their organic law.

Extradition.—This clause and the one following are the only provisions of the Constitution in which any reference is made to the subject of extradition. It is not our purpose to enter upon any extended discussion of the law of this important subject, but only to refer to a few of the leading cases.

“Extradition,” said Mr. Justice Gray, in *Fong Yue Ting v. United States*,²⁰ “is the surrender to another country of one accused of an offense against its laws, there to be tried, and if found guilty, punished.”

The surrender practically is an arrest by a duly authorized agent or officer of the demanding State, and contemplates that the fugitive from justice shall be given into the custody of an officer or agent of the demanding State or government who will return him to the sovereignty from whence he fled to be there tried according to the forms of the law. The demanding government must first

Wilson Dorr, of Providence, on the 25th day of June A. D. 1844, was sentenced to imprisonment for life, at hard labor, in separate confinement, is hereby repealed, reversed, annulled and declared in all respects to be as if it had never been rendered.

“Section 2. To the end that right be done to the said Thomas Wilson Dorr, the clerk of the Supreme Court for the county of Newport, is hereby directed to write across the face of the record of said judgment, the words ‘Reversed and annulled by order of the General Assembly, at their January session, A. D. 1854.’”

The Legislature also requested the Supreme Court of the State to render it an opinion whether such an act was constitutional. The Court did so, and said it was not. It said the Legislature had no authority to reverse and annul a judgment of the Supreme Court, or to order the reversal of the judgment to be written on the face of the record thereof. 3 R. I. 299, 310, 311.

²⁰ 149 U. S. 709.

make out a case against the fugitive; and whether it has done so or not, in each particular instance the Government upon which the demand is made always reserves the right to determine for itself. Such government requires information concerning the person it is asked to surrender, as to the crime with which he is charged and as to the sufficiency of evidence that he committed such crime.²¹

Mr. Wharton, in his *Criminal Law*, says, "The sole object of extradition is to secure the presence of the fugitive in the demanding State for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to criminal prosecutions other than that specified in the demand. Provisions guaranteeing to the fugitive the right to leave the demanding country after his trial for the offense for which he is surrendered, in case of acquittal, or in case of conviction, after his endurance of the punishment, are incorporated in many treaties. When not, they should be made the subject of executive pledge. It is an abuse of this high process and an infringement of those rights of asylum which the law of nations rightly sanctions to permit the charge of an offense for which extradition lies, to be used to cover an offense for which extradition does not lie, or which it is not considered politic to invoke."²²

Fugitives from justice are those persons who, having committed a crime against the laws of a State, Territory, or district, and who, after the commission of the crime, have fled to some foreign country, or to some State, Territory, or district in their own country other than the one in which the crime was committed. So one charged with crime and who was in the place where the crime was committed at the time it was committed, and subsequently left, independent of the reason for which he left, is a fugitive from justice.²³

If the fugitive has fled to a foreign country his extradition is governed by the treaty provisions existing between the United States and the country in which he is arrested. If there be no provision in the treaty governing the offense

²¹ Spear on Extradition, 70.

²² Wharton's *Criminal Law*, 7th Ed., Vol. 3, 34, sec. 2965, a.

²³ *Bassing v. Cady*, 208 U. S. 392; *Appleyard v. Mass.*, 203 U. S. 222; *Illinois, ex rel. McNichols, v. Pease*, 207 U. S. 100.

with which he is charged, he is immune from arrest and return for trial. If the treaty provides for the return of a fugitive for the commission of such an offense its terms control.

If the fugitive has fled to some other State in the United States, or to some district or Territory in the United States, or to any place subject to the jurisdiction and control of the United States, his extradition is controlled by the laws of the United States and of the State or Territory in which he is found, but no law of any State or Territory would be valid which would conflict with the provisions of Congress on the subject of extradition.²⁴

²⁴ The following account of a conversation on the subject of extradition between Secretary of State John Quincy Adams and William Wirt, Attorney General, is entertaining.

"November 16th, 1821.

"I received this evening a note from Mr. Canning, with enclosures, being copies of applications from the Governors of New York and of Vermont to the Governor of Canada requesting him to deliver up two fugitives, one from the State of New York, charged with forgery, and the other from Vermont, with murder. The Governor-General of Canada, Earl of Dalhousie, answers and delivers up both men. I took to Mr. Wirt, the Attorney-General, the note I had received last evening from Mr. Canning, and a volume of Burlamaqui containing precisely the same passage relating to the delivery of fugitive criminals as that in Vattel. Both these writers, as well as Grotius, do in very explicit terms assert the moral obligation of nations to deliver up fugitives guilty of heinous crimes. Mr. Wirt had the English translation of Grotius, with a part of Barbeyrac's notes, and I had sent him the French edition of Barbeyrac, which we compared together; but Mr. Wirt did not seem to be satisfied with the authorities. He wanted a Latin Grotius; but finally came to the denial of the President's authority to deliver up.

"I told him that was the ground I had alleged to Mr. Canning, though I was not entirely satisfied that there was a want of authority. It was made by the Constitution the duty of the President to take care that the laws be faithfully executed; by which may be understood the laws of nations as well as the laws of Congress. Now, if it were clearly and unquestionably the law of nations that fugitives charged with heinous crimes should be delivered up, it would be the duty of the President to take care that that law should be faithfully executed as well as others; and he could not be bound by the duty without possessing the authority necessary for its discharge.

"He said that doctrine was too bold for him; he was too much of a Virginian for that.

The words, "treason, felony, or other crime," embrace every offense of every character, which is known to the law of the State from which an accused person has fled and consequently are to be given the broadest signification and construction.

"The obvious policy and necessity of this provision," said Chief Justice Taney, "was to preserve harmony be-

"I told him that Virginian constitutional scruples were accommodating things. Whenever the exercise of a power did not happen to suit them, they would allow of nothing but powers expressly written; but when it did, they had no aversion to implied powers. Where was there in the Constitution a power to purchase Louisiana? He said that there was a power to make treaties. 'Aye! a treaty to abolish the Constitution of the United States?' 'Oh, no, no!'

"He said the people had sanctioned it. 'How the people?' by their Representatives in Congress; they were the people.

"'Oh,' said I, 'that doctrine is too bold for me.' But as to this power of the President to take care that the laws of nations be faithfully executed without waiting for an act of Congress, it had been exercised by President Washington, by seizing and restoring vessels illegally captured at the commencement of the wars of the French Revolution, before any Act of Congress upon the subject, and it was now exercised continually by the admission duty-free of baggage and articles imported by foreign Ministers.

"All this seemed to make little impression upon Mr. Wirt; and I asked him whether he thought the Governors of the States had the power to deliver up fugitive criminals. He thought they had.

"I said it was no more delegated to them than to the President, and they no more than he, possessed any other than delegated power. They were certainly not especially charged to take care that the laws of nations should be faithfully executed in their respective States, nor had they any power to arrest or detain any individual otherwise than conformably to the laws of the land.

"Wirt mentioned the Treaty of 1794, by which it was stipulated that persons charged with murder and forgery should be delivered up, from which he drew two inferences; first, that it proved the sense of both parties that without the treaty there would be no obligation to deliver up criminals of any description; and, secondly, that even in making the stipulation the specification of these two crimes was equivalent to an agreement that they would deliver up no others.

"I objected to both these conclusions, at least in their entire latitude. I said that stipulations in treaties were often only in affirmance of principles which would without them be binding, and that the specification might only be of the two crimes for which the refuge would be most likely to be sought, and would be reciprocally most dangerous to bordering countries.

"We both agreed that it was a subject deserving the attention of Congress." *Memoirs of John Quincy Adams*, vol., 5, 400, 402.

tween the States and order and law within their respective borders, and to its early adoption by the Colonies and then by the Confederate States, whose mutual interest it was to give each other aid and support whenever it was needed,—the conclusion is irresistible, that this compact engrafted in the Constitution included, and was intended to include every offense made punishable by the law of the State in which it was committed.”²⁵

Concerning the surrender of fugitives from justice the individual States of the Union do not sustain toward the United States the relation which the United States sustains toward other governments. Governments usually surrender fugitives to each other as the result of treaty provisions and in the absence of such provisions fugitives are not surrendered. But in relation to the States the subject is not determined by treaty, but is controlled by the Constitution and laws of the United States and the States, and it is doubtful whether the States, under the Constitution could stipulate as to the offenses for which fugitives from justice should be surrendered by them to the United States. The duty of determining who is a fugitive from justice rests upon the Governor of the State where the accused is found.²⁶

The language of this clause limits the place in which any person charged with treason, felony, or other crime has been committed, or in which the person committing such crime, shall be found, to a “State.” This may be accounted for from the fact that the Constitutional Convention did not recognize any territorial subdivisions less than States. Territories and Districts have been introduced into our constitutional and legal nomenclature since the Constitution was formed, and therefore, the Convention used only the word “State,” as representing the place from which, and to which, the accused might flee. But Congressional legislation has corrected the error if there was any.

An act of Congress provided, “Whenever the executive authority of any State, or Territory demands any person as a fugitive from justice from the executive authority of any State or Territory to which such person has fled,”

²⁵ Kentucky v. Dennison. 24 Howard, 69, 99.

²⁶ Ex parte Reggel, 114 U. S. 642.

etc. A man having committed an offense in the State of Pennsylvania fled to the Territory of Utah, where he was apprehended and demand made upon the Governor of the Territory for his return by the Governor of Pennsylvania. Several objections were made in behalf of the accused. The first was that the requisition was not valid as it was not based upon the commission of a felony, but that view was held to be erroneous. It was further held that though the constitutional provision involved did not refer to fugitives from justice of any State, who might be found in one of the Territories of the United States, nevertheless, the act of Congress had equal application to that class of cases, and the words, "treason, felony or other crime," must receive the same interpretation, when the demand for the fugitive is made, under that act, upon the Governor of a Territory, as when made upon the Governor of a State.²⁷

So the word "State" includes the District of Columbia.²⁸

For some years there was a difference of opinion in the Federal Courts on the question whether a fugitive from justice could be tried by the demanding State for a crime other than the one with which he was charged in the requisition of the demanding Governor. But it has been settled that a demanding State, after a fugitive from justice has been returned to it, may try him for any offense which he committed there, however different from the one charged in the requisition of the demanding Governor, without first permitting him to return to the State from which he was extradited.²⁹

But the rule is different when a fugitive from justice is extradited under the provisions of a treaty. In such case he cannot be punished for an offense different from that for which he has been extradited. This grows out of the treaty provision. Extradition treaties are construed in keeping with the highest and best faith and should not be construed so as to obtain the extradition of persons for one offense and their punishment for another.³⁰

²⁷ *Ex parte Reggel*, 114 U. S. 650; *People of New York v. Commissioners*, 211 U. S. 468, 474.

²⁸ *Price v. McCarty*, 89 Fed. Rep. 84.

²⁹ *Lascelles v. Georgia*, 148 U. S. 537-45.

³⁰ *Johnson v. Brown*, 205 U. S. 309, 320, 321.

But this provision would not apply when the fugitive had committed an offense after his extradition, and in such case the country to which the fugitive is surrendered is entitled to decide which indictment he shall be tried upon.⁸¹

Both Federal and State judges have the right to issue a writ of *habeas corpus* and inquire into the legality of an arrest of an alleged fugitive from justice on the demand made by the Governor of another State.⁸²

It was said in *Holmes v. Jennison*,⁸³ by Mr. Justice Catron, "The uniform opinion heretofore has been that the States on the formation of the Constitution had the power of arrest and surrender in cases of fugitives from justice; and that so far from taking it away, the Constitution had provided for its exercise, contrary to the will of a State, in case of an unjust refusal; thereby settling, as among the States, the contested question, whether on a demand, the obligation to surrender was perfect and imperative, or whether it rested on comity and was discretionary."

It was held that the Cherokee Nation is neither a State nor a Territory in the sense in which these words are used in this clause, and in the act of Congress relating to extradition. Consequently a Governor of a State could not, under the laws and Constitution of the United States, issue a warrant of arrest upon a supposed fugitive from justice at the demand of the Chief of the Cherokee Nation.⁸⁴

The courtesy due from one State to another requires the surrender to a demanding State of a person who has committed a crime in that State, while in another State. Thus, if a man, while in the State of Ohio, should shoot and kill a person in the State of Indiana, he could not be said to be a fugitive from justice from the latter State, but the comity existing between the States would require that the State of Ohio should surrender the accused to the State of Indiana, upon proper demand being made.⁸⁵

In an application for a supposed fugitive from justice an information is not the equivalent of an indictment under

⁸¹ *Collins v. O'Neil*, 214 U. S. 113, 122, 123.

⁸² *Robb v. Connolly*, 111 U. S. 624, 637, 638.

⁸³ 14 Peters, 567.

⁸⁴ *Ex parte Morgan*, 20 Fed. Rep. 307.

⁸⁵ *State v. Hall*, 115 N. C. 811, 824.

the revised statutes of the United States, which require the surrender of a fugitive from justice on demand from another State upon the production of an indictment or affidavit, made before a magistrate, charging the defendant with a crime. Neither is the verification of an information on belief the equivalent of such an affidavit as the statute requires.³⁶

The proper mode of determining if one is held under an extradition warrant as a fugitive from justice is by writ of *habeas corpus*, and it is the duty of the court to refuse to grant the writ of extradition unless it is shown by competent evidence that the accused is a fugitive from justice from the State which demands him. When a requisition is based upon an indictment that the offense was committed on a certain day—though the hour of the day was not specified—the supposed fugitive fails to overcome a *prima facie* case by proving that he was not at the place of the crime for a part of the day only, unless he does not disclose the hour at which the crime was committed, and unless also it appears that the supposed fugitive might have been at the place named a part of the day.

Where one is held in custody as a fugitive from justice under a warrant of extradition duly issued, he should not be discharged unless it is satisfactorily shown that he is not a fugitive from justice within the Constitution and laws of the United States.³⁷

Though the extradition of an alleged fugitive from justice has been secured by fraud and connivance previously arranged between the authorities of the demanding and surrendering States in order to deprive him of an opportunity of applying for release before being surrendered to the demanding State for deportation, he cannot, when once within the demanding State, and in custody of its officers, be discharged on *habeas corpus* by a Federal Court. An agent of the demanding State is under no obligation arising from the Constitution or laws of the United States to arrange the arrest of a fugitive from justice, and his deportation from the State where arrested so as to allow him an opportunity for a hearing before some judicial tribunal.³⁸

³⁶ Ex parte Hart, 11 C. C. A. 165.

³⁷ McNichols v. Pease, 207 U. S. 100, 110, 111, 112.

³⁸ Pettibone v. Nichols, 203 U. S. 192-210-212.

Mr. Justice Harlan in his opinion in this case said (p. 214): "The United States do not recognize any right of asylum in the State where a party charged with a crime committed in another State is found; nor have they made any provision for the return of parties who, by violence and without lawful authority, have been abducted from a State; and, whatever effect may be given by a State court to the illegal mode in which a defendant is brought from another State no right secured under the Constitution and laws of the United States is violated by his arrest and imprisonment for crimes committed in the State into which he is brought."

A party having been indicted in Kentucky for murder fled to West Virginia and while in the latter State was arrested and forcibly taken to Kentucky by a body of armed men, and imprisoned in the latter State. Thereupon the Governor of West Virginia demanded of the Governor of Kentucky that the supposed fugitive from justice be released from confinement and permitted to return to the State of West Virginia, which request was refused. A writ of *habeas corpus* was asked for praying for the release of the prisoner. The case having been taken to the Supreme Court of the United States it was there held, that the laws of the United States did not recognize any right of asylum on the part of a fugitive from justice in any State to which he flees; nor is there any provision in the Constitution or laws of the United States, for the return of parties who, by violence and without lawful authority have been abducted from the State to which they have fled and taken to the State where the crime is supposed to have been committed. Consequently, there is no authority in the courts of the United States to act in such case. And there is no comity between the States which requires a person within the jurisdiction of one State to be surrendered to another, though he may have been forcibly abducted from it.²⁹

If the Executive of a State, upon whom a demand is made for the surrender of a fugitive from justice, declines to do so there is no way by which he can be compelled to surrender the fugitive. "The obligations which the act of Congress imposes upon an Executive of a State to surren-

²⁹ Mahon v. Justice, 127 U. S. 700-715.

der a fugitive from justice when demand is made upon him to do so, were not used," said Chief Justice Taney, "as mandatory and compulsory, but as declaratory of the moral duty, which this compact created, when Congress had provided the mode of carrying it into execution; and there is no means provided by which to compel the execution of this duty, nor inflict any punishment upon neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the Constitution of the United States which arms the Government with this power." The court further said: "Such a power would place every State under the control and dominion of the General Government and we think it clear that the Federal Government, has no power under the Constitution to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possesses this power, it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might also impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State."⁴⁰

Before one can be lawfully removed under this clause from one State to another it must appear, 1st, that he is charged in one State with treason, felony, or other crime; 2nd, that he has fled from justice; 3rd, that a demand is made for his delivery to the State wherein he is charged with crime. If either of these conditions are absent no warrant of arrest can be issued. But these provisions are made out when a crime is charged against the person whose return is sought, and an indictment is sufficient upon which to base an order for a return when it clearly describes a crime.⁴¹

The surrender by a country to which a fugitive from justice has fled, to the country from which he fled, is of comparatively modern origin. The rule now, however, is well established among civilized nations, and may be attributed to the influence which has been exerted by treaty regulations, as the surrender of a supposed fugitive from justice by one nation to another is now generally covered by the provisions of international treaties. Before

⁴⁰ Commonwealth of Kentucky, v. Dennison, 24 Howard 107-108.

⁴¹ Pierce v. Creecy, 210 U. S. 387-401.

the establishment of treaties, no nation was under any obligation to surrender a fugitive to another nation, though it was sometimes done as a result of international comity. "But," says Mr. Justice Miller, "it has never been recognized as among those obligations of one government towards another, which rest upon established principles of international law."⁴²

But upon this question there was a difference of opinion among jurists. Mr. Chancellor Kent, in the case of *Washburn*,⁴³ announced that it was the duty of a State to surrender fugitive criminals.

But soon afterwards, Chief Justice Tilghman, in *Short v. Deacon*,⁴⁴ announced the contrary doctrine, holding that the surrender of a fugitive pertained to the executive branch of the national government, to which the demand of the foreign power must be addressed; that the judges could not legally deliver up a fugitive, nor could they command the executive to do so.

"Whether in the United States," says Mr. Justice Miller, in *United States v. Rauscher*, *supra*, p. 412, "in the absence of any treaty on the subject with a foreign nation, and in the absence of any congressional provision on the subject a *State* can, through its own judiciary or executive, surrender a fugitive from justice to such foreign nation, is a question which the Courts have not determined, though it has been under consideration by them."

No Person held to Service or Labor in one State, under the Laws thereof, escaping into another, shall in Consequence of any Law or Regulation therein, be discharged from such Service or Labor, but shall be delivered up on Claim of the Party to whom such Service or Labor may be due.

This clause does not seem to have been contained in the report of any committee made to the Convention, but on the 28th of August, Mr. Butler and Mr. Pinckney moved in the Convention "to require fugitive slaves and servants to be delivered up like criminals." Mr. Wilson said this

⁴² *United States v. Rauscher*, 119 U. S. 412.

⁴³ 4 Johns. Ch. 166.

⁴⁴ 10 S. & R. 125.

would oblige the Executive of the State to do it, at the public expense.

Mr. Sherman saw no more propriety in the public in seizing and surrendering a slave or servant than a horse.

Mr. Butler thereupon withdrew his proposition, in order that some particular provision might be made, concerning it.⁴⁵

The following day he moved to insert: "If any person bound to service or labor in any of the United States, shall escape into another State, he or she shall not be discharged from such service or labor, in consequence of any regulations subsisting in the State to which they escape, but shall be delivered up to the person justly claiming their service or labor." This was agreed to *nem. con.*,⁴⁶ and later was changed to its present form by the Committee on Style.

This section was inserted in the interest of slaveholders. Its purpose was to give a slaveholder the right to pursue a slave who had escaped into a free State and take him to the State from which he escaped, notwithstanding any law or regulation which might exist in the State in which the slave was arrested.

As early as 1793 Congress passed an act entitled, "An act respecting fugitives from justice and persons escaping from the service of their masters," which was intended to supplement the constitutional provision in reference to the return of runaway slaves to their masters.

In the great case of *Prigg v. Commonwealth of Pennsylvania*,⁴⁷ Mr. Justice Taney in referring to this clause remarked (p. 611):

"Historically, it is well known, that the object of this clause was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property, in every State in the Union into which they might escape from the State where they were held in servitude. The full recognition of this right and title was indispensable to the security of this species of property in all the slaveholding States; and, indeed, was so vital to the preservation of their domestic interests and

⁴⁵ Journal, 624.

⁴⁶ Journal, 631.

⁴⁷ 16 Peters, 539.

institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed. Its true design was to guard against the doctrines and principles prevalent in the non-slaveholding States, by preventing them from intermeddling with, or obstructing, or abolishing the rights of the owners of slaves.

“By the general law of nations, no nation is bound to recognize the state of slavery, as to foreign slaves found within its territorial dominions, when it is in opposition to its own policy and institutions, in favor of the subjects of other nations where slavery is recognized. If it does it, it is as a matter of comity, and not as a matter of international right. The state of slavery is deemed to be a mere municipal regulation, founded upon and limited to the range of the territorial laws. This was fully recognized in *Somerset's case*, Lofft's Rep. 1; s. c., 11 State Trials by Farg. 340; s. c., 20 Howell's State Trials, 79; which was decided before the American Revolution. It is manifest from this consideration, that if the Constitution had not contained this clause, every non-slaveholding State in the Union would have been at liberty to have declared free all runaway slaves coming within its limits, and to have given them entire immunity and protection against the claims of their masters; a course which would have created the most bitter animosities and engendered perpetual strife between the different States. The clause was, therefore, of the last importance to the safety and security of the Southern States, and could not have been surrendered by them without endangering their whole property in slaves. The clause was accordingly adopted into the Constitution by the unanimous consent of the framers of it; a proof at once of its intrinsic and practical necessity.”⁴⁸

⁴⁸ Mr. Webster in his celebrated speech delivered in the Senate of the United States on March 7th, 1850, and which was generally believed greatly to have injured his chances for the Presidency, in referring to this clause remarked:

“I have always thought that the Constitution addressed itself to the legislatures of the States or to the States themselves. It says that those persons escaping to other States ‘shall be delivered up,’ and I confess I have always been of the opinion that it was an injunction upon the States themselves. When it is said that a person escaping into another State, and coming therefore within the jurisdiction of that

Since the abolition of slavery in the United States this clause has only an historical interest.

State, shall be delivered up, it seems to me the import of the clause is that the State itself in obedience to the Constitution shall cause him to be delivered up. That is my judgment. I have always entertained that opinion, and I entertain it now. But when the subject, some years ago, was before the Supreme Court of the United States, the majority of the judges held that the power to cause fugitives from service to be delivered up was a power to be exercised under the authority of this government. I do not know, on the whole, that it may not have been a fortunate decision. My habit is to respect the result of judicial deliberations and the solemnity of judicial decisions. As it now stands, the business of seeing that these fugitives are delivered up resides in the power of Congress and the national judicature, and my friend at the head of the judiciary committee has a bill on the subject now before the Senate, which, with some amendments to it, I propose to support, with all its provisions, to the fullest extent. And I desire to call the attention of all sober-minded men at the North, of all conscientious men, of all men who are not carried away by some fanatical idea or some false impression, to their constitutional obligations. I put it to all the sober and sound minds at the North as a question of morals and a question of conscience. What right have they, in their legislative capacity, or any other capacity to endeavor to get round this Constitution, or to embarrass the free exercise of the rights secured by the Constitution to the persons whose slaves escaped from them? None at all; none at all. Neither in the forum of conscience, nor before the face of the Constitution, are they, in my opinion, justified in such an attempt. Of course it is a matter for their consideration. They probably, in the excitement of the times, have not stopped to consider of this. They have followed what seemed to be the current of thought and of motives, as the occasion arose, and they have neglected to investigate fully the real question, and to consider their constitutional obligations; which, I am sure, if they did consider, they would fulfill with alacrity. I repeat, therefore, sir, that here is a well-founded ground of complaint against the North, which ought to be removed, which it is now in the power of the different departments of this government to remove; which calls for the enactment of proper laws authorizing the judicature of this government, in the several States, to do all that is necessary for the recapture of fugitive slaves and for their restoration to those who claim them. Wherever I go, and whenever I speak on the subject, and when I speak here I desire to speak to the whole North, I say that the South has been injured in this respect, and has a right to complain; and the North has been too careless of what I think the Constitution peremptorily and emphatically enjoins upon her as a duty." Works of Daniel Webster, vol. 5, 354, 355.

CHAPTER XLVII.

ADMISSION OF NEW STATES.

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The first part of this clause is attributable to Gouverneur Morris, and the latter part to Mr. Dickinson.

The earliest provision relative to the admission of new States into the Union was contained in a resolution reported by a committee of Congress, March 1, 1784, of which Mr. Jefferson was chairman. The resolution provided that the territory which should be ceded by individual States to the United States should be formed into distinct States. That the States might organize a temporary government which should continue in force until a State had acquired twenty thousand free inhabitants, at which time it should receive authority from Congress to call a convention of representatives for the purpose of establishing a permanent government for itself. But both the temporary and permanent governments should be established on the following principles as their basis:

“1. That they shall forever remain a part of the United States of America. 2. That in their persons, property and territory, they shall be subject to the Government of the United States in Congress assembled and to the Articles of Confederation in all those cases in which the original States shall be so subject. 3. That they shall be subject to pay a part of the Federal debts contracted or to be contracted to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States. 4. That their respective governments shall be in

republican forms, and shall admit no person to be a citizen, who holds any hereditary title. 5. That after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said States, otherwise than in punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty."¹

There was a proviso, that when any of the States should have free inhabitants equal in number to the least numerous of the thirteen original States, such State should be admitted by its delegates into the Congress of the United States on an equal footing with the original States. The States which were to be formed out of the territory embraced by the resolution were to be named: Sylvania, Michigamia, Chersonesus, Assenisipia, Metropotamia, Illinoia, Saratoga, Washington, Polypotamia and Pelisipia.

The report of the committee not being entirely satisfactory to Congress, that body recommitted it to the committee for amendment. After making some slight amendments and changes in the report the committee again submitted it to Congress and that body adopted it on March 22, 1784.² The report was superseded by the passage by Congress three years afterwards of the celebrated Ordinance of 1787.

There was a provision in the Articles of Confederation that Canada upon certain conditions might be admitted into and be entitled to the advantages of the Union, but no other Colony could be admitted unless agreed to by nine States.

The plans of Mr. Randolph, Mr. Pinckney and Mr. Pat-

¹ Ford's Jefferson, vol. 3, 407-410.

² Ford's Jefferson, vol. 3, 430-432.

This report has been regarded as one of the strongest papers which Mr. Jefferson ever prepared. It is said, "Next to the Declaration of Independence (if indeed standing second to that) this document ranks in historical importance of all those drawn by Mr. Jefferson." It provided that after the year 1800 there should be neither slavery nor involuntary servitude in any of the States, which shall thereafter be admitted into the Union, except for the punishment of crime. Had the ordinance remained in force or its principles been incorporated into the Constitution, it would have forever prohibited slavery in the United States.

Ford's Jefferson, vol. 3, 430, note.

erson each provided for the admission of new States. That of Mr. Randolph was, "Provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole."³

Mr. Pinckney's plan read, "The Legislature shall have power to admit new States; provided two-thirds of the members present in both Houses agree."⁴

Mr. Paterson's plan simply provided that provision should be made for the admission of new States into the Union.⁵

When Mr. Randolph's resolution was submitted to the Committee of the Whole it was agreed to without change.⁶

The Committee of Detail reported on the subject, "New States lawfully constituted or established within the limits of the United States may be admitted, by the legislature, into this Government; but to such admission the consent of two-thirds of the members present in each House shall be necessary. If a new State shall arise within the limits

³ Journal, 63.

⁴ Journal, 72.

In the Convention Mr. Pinckney said, "The article empowering the United States to admit new States into the confederacy, is become indispensable from the separation of certain districts from the original States—and the increasing population and consequence of the Western territory. I have also added an article authorizing the United States upon petition from the majority of the citizens of any State or convention authorized for that purpose, and of the legislature of the State to which they wish to be annexed, or of the States among which they are willing to be divided, to consent to such junction or division, on the terms mentioned in the article. The inequality of the federal members, and the number of small States is one of the greatest defects of our Union. It is to be hoped, this inconvenience will, in time, correct itself; and that the smaller States, being fatigued with the expense of their State systems, and mortified at their want of importance, will be inclined to participate in the benefits of the larger, by being annexed to and becoming a part of their governments. I am informed sentiments of this kind already prevail; and in order to encourage propositions so generally beneficial, a power should be vested in the Union, to accede to them whenever they are made." *Moore's American Eloquence*, vol. 1, 368.

⁵ Journal, 166.

⁶ Journal, 110.

of any of the present States, the consent of the legislatures of such States shall be also necessary to its admission. If the admission be consented to, a new State shall be admitted upon the same terms with the original States. But the legislature may make conditions with the new States, concerning the public debt which shall be then subsisting.”

In the Convention, when this article was under consideration, Mr. Gouverneur Morris moved to strike out the last two sentences of the clause, because he did not wish to bind down the Legislature to admit Western States on the terms here stated.

Mr. Madison opposed the motion, insisting that the Western States neither would nor ought to submit to a union which degraded them from equal rank with the other States.

Colonel Mason said if it were possible by just means to prevent emigrations to the Western country, it might be good policy. But go the people will, as they find it for their interest; and the best policy is to treat them with that equality which will make them friends, not enemies.

Mr. Morris said he did not mean to discourage the growth of the Western country. He knew that to be impossible. He did not wish, however, to throw the power into their hands. On the motion of Mr. Morris to strike out the last two sentences it was carried by a vote of nine to two.⁷

Mr. Martin and Gouverneur Morris then moved to strike out the words, “but to such admission the consent of two-thirds of the members present shall be necessary.” Before this motion was put, Mr. Morris moved the following proposition as a substitute: “New States may be admitted by the legislature into the Union; but no new States shall be erected within the limits of any of the present States, without the consent of the Legislature of such States, as well as of the General Legislature.” The motion was then divided, and that part which read, “new States may be admitted by the legislature into the Union,” was agreed to unanimously. The other part of

⁷ Journal, 460.

⁸ Journal, 631, 632.

the motion had opposition, but upon a vote being taken the remaining portion of Mr. Morris's motion was also carried by a vote of six to five.⁹ The question then came up on the provision as amended, and Mr. Sherman opposed it. He thought it unnecessary. The Union, he said, could not disbar a State without its consent. Quite a debate occurred on the adoption of the article as amended.

Mr. Carroll moved to strike out so much of the article as requires the consent of the State to its being divided, and Mr. Martin seconded the motion. Mr. Carroll's motion was lost by a vote of three to eight. After some additional discussion the question came up on Mr. Morris's substitute article as amended, which read, "New States may be admitted by the legislature into the Union; but no new State shall be hereafter formed or erected within the jurisdiction of any of the present States, without the consent of the legislature of such State, as well as of the General Legislature," and it was carried by a vote of eight to three.¹⁰

Mr. Dickinson then moved to add the following clause to the substituted article just adopted: "Nor shall any State be formed by the junction of two or more States, nor parts thereof, without the consent of the legislatures of such States, as well as of the legislature of the United States," and this was agreed to without a count of the votes.¹¹ As reported by the Committee on Style the clause read as it is found in the Constitution.¹²

All the territory between the Atlantic and Pacific Oceans having been formed into territories and all the territories, but two, having been formed into States and admitted into the Federal Union, the provisions of this clause have ceased to have that practical interest to the student of the Constitution and American politics which it had in the earlier history of the country, and yet it is important to understand what construction has been placed upon this provision.

When a State is admitted into the Union it shares all

⁹ Journal, 632.

¹⁰ Journal, 637.

¹¹ Journal, 637.

¹² Journal, 711.

the rights of sovereignty, jurisdiction and eminent domain of the old States.¹³

Sovereignty of the State, where it resides.—In *Spooner v. McConnell*,¹⁴ McLean, Justice, held (p. 347): “The sovereignty of a State does not reside in the persons who fill the different departments of the Government; but in the people from whom the government emanated, and who may change it at their discretion. Sovereignty, then, in this country, abides with the constituency and not with the agent. And this is true, both in reference to the federal and State governments.”

On an equal footing with the original States.—McLean Justice also said: “Does this provision mean, that the new State shall exercise the same powers and in the same modes, as are exercised by any other State? Now this cannot be the true construction of the provision, for there cannot be found, perhaps any two States in the Union whose legislative, judicial and executive powers are in every respect alike. If the argument be sound, that there is no equal footing short of exact equality in this respect, then the States are not equal. But if the meaning be, that the people of the new State, exercising the sovereign powers which belong to the people of any other State, shall be admitted into the Union subject to such provisions in their fundamental law as they shall have sanctioned; within the restrictions of the Federal Constitution, then the States are equal. Equal in rank, in their powers of sovereignty; and only differ in their restrictions, which, in the exercise of those powers, they may have voluntarily imposed upon themselves.”

Upon being admitted as a State into the Union the property of a Territory passes to the State.—In *Brown v. Grant*,¹⁵ it was held: “Unless otherwise declared by Congress, the title to every species of property owned by a Territory passes to the State upon its admission into the Union.”

¹³ *Pollard's Lessee v. Hagan*, 3 Howard, 212, 224; *Knight v. U. S. Land Assn.*, 142 U. S. 183; *Escannaba Co. v. Chicago*, 107 U. S. 688; *Weber v. Harbor Commissioners*, 18 Wallace, 65.

¹⁴ 1 McLean, 337.

¹⁵ 116 U. S., 212.

The Power of Congress in the admission of new States, its limitations.—There is no power in Congress to compel the people of a Territory to come into the Union as a State. It must be a free and voluntary act on their part, but must be done in the manner provided for by Congress.

The acts of Congress which from time to time have been passed, governing the admission of States into the Union where the subjects of each were identical or similar to each other, did not constitute a common system of admission, so that a claimant under a later act could contend that it had changed an earlier one either by construction or by declaring the meaning of such earlier act. Nor does this section permit the claims of any particular State to be prejudiced by the exercise of the power of Congress under it.¹⁶

No geographical division less than a State can be admitted. What Congress has power to admit as a member of the Federal Union is a new State, nothing else. In an opinion to the President on the admission of West Virginia, Attorney-General Bates held: "Congress can admit new States into the Union, but cannot *form* States. It has no creative power in that respect, and cannot admit into this Union any Territory, district, or other political entity, less than a State. And such State must exist as a separate and independent body politic, before it can be admitted under that clause of the Constitution, and there is no other clause on the subject. The new State which Congress may admit, by virtue of this clause does not owe its existence by the fact of admission, and does not begin to exist coeval with that fact; for, if that be so, then Congress *makes* the State."¹⁷

Two prohibitions are placed by this clause upon the formation of new States. First, no State shall be formed or erected within the jurisdiction of any other State; second, no State can be formed by the junction of two or more States, or parts of States, without the consent of the legislatures of the States concerned and of Congress. The first of these prohibitions is so plain as to need no

¹⁶ *Louisiana v. Mississippi*, 202 U. S., 1-40.

¹⁷ 10 A. G. Op., 427.

comment or explanation. As to the second, where a State is to be formed by the junction, or union of two or more States, or any parts of two or more States, the consent of the legislatures of each of the interested States must be obtained, and so must the consent of Congress. On this point the Attorney-General in the case referred to said: "The consent required by the Constitution was not the consent of a State generally, nor of its governor, nor its judiciary, nor its conventions, but the consent of the legislatures of the States concerned."

There is no provision of the Constitution which expressly confers authority upon the United States to enlarge their national territory or domain, either by purchase, conquest, annexation or treaty. Had such a provision been inserted it might have avoided certain political questions of great interest and, at times, of great danger to the country. But the insertion of such a clause was unnecessary, as it is one of the rights of sovereignty that a government may enlarge its territory and domain by any method known to civilized nations. The great extent of territory now occupied by the United States has been acquired in one of these ways. Louisiana was obtained under the administration of Jefferson; Florida under Monroe; Texas was admitted during the Presidency of Tyler, and the territory acquired from Mexico was taken under Polk. Alaska was purchased from Russia during the administration of Johnson; and Porto Rico, and the Philippine Islands were acquired by treaty as the result of war with Spain during the term of President McKinley.

The Constitution contains no provision as to how new States shall be admitted to the Union. It simply says, they may be admitted. The manner of admitting them has not been wholly uniform. But the general way is for a territory, when it desires to become a State, to petition Congress to that effect, asking that it be permitted to form a State constitution and to come into the Union as a State. If Congress is disposed to grant the request it passes what is called an "enabling act," under which the inhabitants of the territory are authorized to form a constitution. Usually a convention is then held in the territory and a constitution approved and presented to Congress for its approval. If Congress finds that the proceedings

have been according to the usual method and regular, and the constitution appears unobjectionable, and if it is willing to admit the territory as a State, it passes another act by which the State is admitted into the Union. When a territory is admitted into the Union it at once takes rank with every other State. There are no grades among the States of the Union. Until a State is in the Union it is out of it, but once in, it is on a perfect equality with every other State.¹⁸

Mr. Madison in the *Federalist* says:

“In the Articles of Confederation, no provision is found on this important subject. Canada was to be admitted of right, on her joining in the measures of the United States; and the other *Colonies*, by which were evidently meant the other British Colonies, at the discretion of nine States. The eventual establishment of *new States* seems to have been overlooked by the compilers of that instrument. We have seen the inconvenience of this omission, and the assumption of power into which Congress have been led by it. With great propriety, therefore, has the new system supplied the defect. The general precaution that no new States shall be formed, without the concurrence of the Federal authority, and that of the States concerned, is consonant to the principles which ought to govern such transactions. The particular precaution against the erection of new States, by the partition of a State without its consent, quiets the jealousy of the larger States; as that of the smaller is quieted by a like precaution, against a junction of States without their consent.”¹⁹

The admission of a State into the Federal Union has sometimes been an occasion of great public interest. This happened when Texas was admitted. Congress passed a resolution admitting the Republic of Texas into the Union as a State. This aroused intense opposition; public meetings were held and protests were filed against the conduct of Congress.

Judge Story maintained that the admission of Texas was unconstitutional. On the 1st of April, 1844, he wrote Ezekiel Bacon: “The Texas question is, or at least ought

¹⁸ *Dick v. United States*, 208 U. S., 340.

¹⁹ *The Federalist*, No. 43.

to be, an absorbing one with all good men and true patriots. In my judgment the admission of Texas into the Union would be a grossly unconstitutional act; and I should not be surprised if it should lead to a dissolution of the Union. Party is the curse of our country, and will probably be the destruction of our liberties, as it was of the old Republics."²⁰

On January 4, 1845, he wrote dolefully to Charles Sumner:

"The debate on the subject of the annexation of Texas is now going on in the House of Representatives; various propositions have been made, and no inconsiderable diversity of opinion is known privately to exist upon the subject among the Democrats. Whether the project will succeed or not at this session, is held by many persons to be uncertain. For myself, I can only say that I have little doubt that it will pass the House, so unscrupulous are many of the 'dough-faced' members, and so various are the influences which will be brought to bear upon them, some of which are too gross even to mention. As to the Senate, there is barely a hope that it may not pass that body. I say barely a hope, for it will turn upon the votes of one or two members who are considered very doubtful. You must not rely too much upon the newspaper writers on this subject; the truth is that the scene changes daily here, and no man can prophesy of the morrow, what will be done, or not done. The most disgraceful after all will be the votes of members from the Northern and Middle States. Without them the project cannot be carried; with them it is sure.

"In every way which I look at the future, I can see little or no ground of hope for our country. We are rapidly on the decline. Corruption and profligacy, demagogism and recklessness characterize the times, and I for one am unable to see where the thing is to end. You, as a young man, should cling to hope; I, as an old man, know that it is all in vain."²¹

On February 16, following, he wrote Prof. Greenleaf on the same subject:

²⁰ Life and Letters of Joseph Story, vol. 2, 481.

²¹ Life and Letters of Joseph Story, vol. 2, 519.

"The Senate are just in the midst of the Texas debate. The papers will tell you who have spoken, and on which side. It is astonishing how easily men satisfy themselves that the Constitution is exactly what they wish it to be. They can expand or contract it at pleasure. To-day they are strict constructionists; tomorrow the most latitudinous powers spring up anywhere and everywhere. To me the question whether Congress could admit Texas has seemed to admit of a doubt. I have all along doubted,—that is not strong enough,—I have all along disbelieved that the treaty-making power extended to such a case. Could the treaty-making power surrender the United States to a foreign power? If not, how does it get the power to unite a foreign State with us? Is there any substantial difference between our joining them and their joining us? The fact is, that the framers of the Constitution never dreamed of such extravagances, and therefore they never provided in terms against them. The whole scope of the Constitution seems to be, not merely in terms, but in spirit and objects, the other way. There seem to me some things that I cannot argue. They are too plain for it."²²

Judge Story's opposition to the manner of admitting Texas into the Union was strongly concurred in by Albert Gallatin the statesman and financier. On April 24, 1844, he presided at a meeting in New York called to protest against it. At that meeting he said, "the resolution of the House declaring the treaty of annexation between the United States of America and the Republic of Texas to be the fundamental law of union between them, without and against the consent of the Senate" was a direct and undisguised usurpation of power and a violation of the Constitution.²³

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular States.

²² Life and Letters of Joseph Story, vol. 2, 514.

²³ Stevens' Life of Gallatin, 351.

Gouverneur Morris was the author of this clause. As it conferred certain express powers upon Congress it would have been appropriate to include it in the special grants of powers conferred upon that body by the eighth section of the first article of the Constitution, but we find it separated from these powers.

Mr. Justice Brewer said, "The full scope of this paragraph has never been definitely settled. Primarily it is the grant of power to the United States of control over its property. But it clearly does not grant to Congress any legislative control over the States; and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."²⁴

The control or disposition of the lands outside of the thirteen States seems not to have engaged the attention of the Convention until it had been some time in session. On the 18th of August, Mr. Madison submitted to the Convention certain powers which he thought should be conferred upon Congress in addition to those which it was proposed to give that body. Among them was the power to dispose of "The unappropriated lands of the United States."²⁵

Mr. Madison's plan was evidently based upon certain acts of Congress passed some time previously which related to the disposition of public lands, most of which were called western lands. The relation of these lands to the various States, or to the general government, was a question which divided the country into at least two factions. Some maintained the lands came within the boundaries of the States and were subject to their control. Others took the position that land lying outside the boundary of a particular State was the property of the general government. While public opinion was thus divided upon this subject, Congress, on the 6th of September, 1780, adopted a report relative to instructions which had been submitted by the General Assembly of Maryland to the delegates in Congress from that State concerning the public lands; also the act of the Legislature of New York, and the remonstrance of the General Assembly of Virginia, each relating to the same subject. The report read:

²⁴ *Kansas v. Colorado*, 206 U. S. 89.

²⁵ *Journal*, 549.

"It appears more advisable to press upon those States which can remove the embarrassments respecting the Western country, a liberal surrender of a portion of their territorial claims, since they cannot be preserved entire without endangering the stability of the general Confederacy; to remind them how indispensably necessary it is to establish the Federal Union on a fixed and permanent basis, and on principles acceptable to all its respective members; how essential to public credit and confidence, to the support of our Army, to the vigor of our councils and success of our measures, to our tranquillity at home, our reputation abroad, to our very existence as a free, sovereign and independent people; that they are fully persuaded the wisdom of the respective legislatures will lead them to a full and impartial consideration of a subject so interesting to the United States, and so necessary to the happy establishment of the federal Union; that they are confirmed in these expectations by a review of the before-mentioned act of the legislature of New York, submitted to their consideration; that this act is expressly calculated to accelerate the Federal alliance, by removing, as far as depends on that State, the impediment arising from the Western country, and for that purpose to yield up a portion of territorial claim for the general benefit, whereupon

"Resolved, That copies of the several papers referred to the Committee be transmitted, with a copy of the report, to the legislatures of the several States, and that it be earnestly recommended to those States, who have claims to the Western country, to pass such laws, and give their delegates in Congress such powers, as may effectually remove the only obstacle to a final ratification of the Articles of Confederation; and that the legislature of Maryland be earnestly requested to authorize their delegates in Congress to subscribe the said Articles."²⁸

On the 10th of October, following the passage of this resolution Congress passed another resolution on the subject:

"That the unappropriated lands that may be ceded or relinquished to the United States, by any particular State, pursuant to the recommendation of Congress of the 6th

²⁸ Journal of Congress, vol. 6, 123.

day of September last, shall be disposed of for the common benefit of the United States, and be settled and formed into distinct republican States, which shall become members of the Federal Union, and have the same rights of sovereignty, freedom and independence, as the other States: that each State which shall be so formed shall contain a suitable extent of territory, not less than one hundred nor more than one hundred and fifty miles square, or as near thereto as circumstances will admit: That the necessary and reasonable expenses which any particular State shall have incurred since the commencement of the present war, in subduing any British posts, or in maintaining forts or garrisons, within and for the defense, or in acquiring any part of the territory that may be ceded or relinquished to the United States, shall be reimbursed: That the said lands shall be granted or settled at such times and under such regulations as shall hereafter be agreed on by the United States in Congress assembled, or any nine or more of them."²⁷

Acting in pursuance of this resolution and the evident feeling of Congress, the legislatures of several States passed acts ceding lands to the general government which they had claimed as rightfully belonging to them. The first of these cessions was made by the State of New York, March 1, 1781, followed by Virginia in 1784, by Massachusetts in 1785, Connecticut in 1786, and by South Carolina in 1787. All these cessions were made while the country was governed by the Articles of Confederation, and consequently before the adoption of the Constitution. Such was the condition relative to public lands when the Constitutional Convention met, and it was doubtless this condition which led the Convention to adopt the clause, which it seems, grew out of the additional power which Mr. Madison desired should be conferred upon Congress.

Later in the Convention, while the article in the report of the Committee of Detail on the admission of new States was being considered, the question of the public lands came up and a short debate occurred over it.

Mr. Gouverneur Morris moved: "The legislature shall

²⁷ Journal of Congress, vol. 6, 146, 147.

have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution contained shall be so construed as to prejudice any claims, either of the United States or of any particular State."²⁸

Mr. Luther Martin moved to amend this proposition by adding to it, "but all such claims may be examined into, and decided upon, by the Supreme Court of the United States." The amendment was lost, only two States favoring it, and the motion of Mr. Morris was then passed, Maryland alone voting against it.²⁹ With the change of only two or three words it is the exact language of the Constitution on the subject. At the time the Constitution was adopted the States of North Carolina and Georgia had not ceded to the general government the title to the lands which they claimed, and it is stated that the language, "Nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State," referred to the claims of these States.³⁰ It was doubtless the insertion of this provision that caused these States to relinquish their claims.

Commenting on this clause, Mr. Madison observed: "This is a power of very great importance, and required by considerations similar to those which show the propriety of the former. The proviso annexed, is proper in itself, and was probably rendered absolutely necessary by jealousies and questions concerning the Western territory sufficiently known to the public."³¹

The same eminent authority again said:

"The terms in which this power is expressed, though of a ductile character, cannot well be extended beyond a power over the territory, as property, and a power to make the provisions ready, needful or necessary for the government of settlers until ripe for admission as States into the Union. It may be inferred that Congress did not regard the interdict of Slavery among the needful regulations contemplated by the Constitution since in none of

²⁸ Journal, 638.

²⁹ Journal, 639.

³⁰ Andrews' Manual of the Constitution, 217; Paschal, 242.

³¹ The Federalist, No. 43.

the territorial governments created by them is such an interdict found. The power, however, be its import what it may, is obviously limited to a territory while remaining in that character, as distinct from that of a State."⁸²

Power of Congress over Territories complete.—"Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled that the territory is to be governed under the power existing in Congress to make laws for such Territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."⁸³

In *Murphy v. Ramsey*,⁸⁴ Mr. Justice Matthews, said:

"The people of the United States, as sovereign owners of the National Territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the Government of the United States, to whom all the powers of Government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its terms, or in the purposes and objects of the power itself. . . . But in ordaining government for the Territories, and the people who inhabit them, all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law, from time to time, the form of the local government in a particular Territory, and the qualification of those who shall administer it. It rests with Congress to say whether, in a given case, any of the people, residents in the Territory, shall participate in the election of its officers or the making of its laws; and it may, therefore, take from them any right of suffrage it may previously have conferred, or at any time modify or abridge it as it may deem expedient."

Right of local self-government belongs to the States.—In the above case it was held: "The right of local self-government, as known to our system as a constitutional franchise, belongs, under the Constitution, to the States and to the people thereof, by whom that Constitution was

⁸² Madison's Writings, vol. 3, 152, 153.

⁸³ *Dorr v. United States*, 195 U. S., 143.

⁸⁴ 114 U. S. 44.

ordained, and to whom by its terms all power not conferred by it upon the Government of the United States was expressly reserved."

Personal and civil rights of inhabitants of the Territories.—It was held also in the same case: "The personal and civil rights of the inhabitants of the Territories are secured to them, as to other citizens, by the principles of constitutional liberty which restrain all the agencies of government, State and National; their political rights are franchises which they hold as privileges in the legislative discretion of the Congress of the United States."

In *National Bank v. County of Yankton*,³⁵ Chief Justice Waite said:

"The Territories are but political subdivisions of the outlying dominion of the United States. Their relation to the General Government is much the same as that which counties bear to the respective States, and Congress may legislate for them as a State does for its municipal organization. The organic law of a Territory takes the place of a constitution as the fundamental law of the local government."

In *Simms v. Simms*,³⁶ it was held: "In the Territories of the United States, Congress has the entire dominion and sovereignty, national and local, Federal and State, and has full legislative power over all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, entrust that power to the legislative assembly of a Territory."

Congress may prescribe the form of government for the Territories.—In *Binns v. United States*,³⁷ Justice Brewer said:

"It must be remembered that Congress, in the government of the Territories, has plenary power, save as controlled by the provisions of the Constitution; that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a *quasi* State government, with executive, legislative and

³⁵ 101 U. S. 133.

³⁶ 175 U. S. 168.

³⁷ 194 U. S. 491.

judiciary officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. . . . It may legislate directly in respect to the local affairs of a Territory or transfer the power of such legislation to a legislature elected by the citizens of the Territory."

Power of Congress to govern Territory; where lodged.—In *United States v. Kagama*,³⁸ it was held: "The power of Congress to organize Territorial governments, and make laws for their inhabitants, arises not so much from the clause in the Constitution in regard to disposing of and making rules and regulations concerning the Territory and other property of the United States, as from the ownership of the country in which the Territories are, and the right of exclusive sovereignty which must exist in the National Government must be found nowhere else."

A State cannot prevent Congress from legislating for the protection of the public lands.—In *Camfield v. United States*,³⁹ the court said:

"While we do not undertake to say that Congress has the unlimited power to legislate against nuisances within a State, which it would have within a Territory, we do not think the admission of a Territory as a State deprives it of the power of legislating for the protection of the public lands, though it may thereby involve the exercise of what is ordinarily known as the police power, so long as such power is directed solely to its own protection. A different rule would place the public domain of the United States completely at the mercy of State legislation."

Prohibiting the sale of intoxicants in a Territory.—The power to prohibit the importation and sale of intoxicating liquors in a Territory is vested in Congress.⁴⁰

Territory belonging to the United States.—These words, said Mr. Justice Curtis, were not used in the Constitution to describe an abstraction, but to identify and apply to the actual subject matter then existing and belonging to the United States, and other similar subjects which might afterwards be acquired; and, this being so, all the essen-

³⁸ 118 U. S. 380.

³⁹ 167 U. S. 525.

⁴⁰ *Endleman v. United States*, 86 Fed. Rep. 456, 459; *Nelson v. U. S.*, 30 Fed. Rep. 112.

tial qualities and incidents attending such actual subjects are embraced within the words "territory belonging to the United States," as fully as if each of those essential qualities and incidents had been specifically described.⁴¹

Acquisition and government of national domain.—The power to acquire territory is inherent in every sovereignty. The acquisition may be accomplished by treaty, purchase, or discovery. The usual mode is by treaty. When territory is acquired by the United States, Congress can form it into a district—by which is meant a subdivision inferior to a territory. In time it can be formed into a territory with a territorial legislature elected by the citizens residing therein who are qualified to vote. But the territorial officers must be appointed by the President, and Congress reserves the right to legislate for the territory, and all laws of the territorial legislature inconsistent with those of Congress are void. Later the territory may be admitted into the Union as a State, or it might have been admitted as a State upon its acquisition, without passing through the political status of an inferior form of government, as was done in the early history of our country with Vermont, and later with Texas.

In *American Insurance Company v. Canter*,⁴² Chief Justice Marshall said:

"Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned."

In *Clinton v. Englebrecht*, Chief Justice Chase said: .
"The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with

⁴¹ *Life and Writings of B. R. Curtis*, vol. 2, 275.

⁴² 1 Peters, 541.

certain fundamental principles established by Congress. As early as 1784 an ordinance was adopted by the Congress of the Confederation providing for the division of all the territory ceded or to be ceded, into States, with boundaries ascertained by the ordinance. These States were severally authorized to adopt for their temporary government the constitution and laws of any one of the States, and provision was made for their ultimate admission by delegates into the Congress of the United States. We thus find the first plan for the establishment of governments in the Territories, authorized the adoption of State governments from the start, and committed all matters of internal legislation to the discretion of the inhabitants, unrestricted otherwise than by the State constitution originally adopted by them.

"This ordinance, applying to all Territories ceded or to be ceded, was superseded three years later by the Ordinance of 1787, restricted in its application to the territory northwest of the river Ohio—the only territory which had then been actually ceded to the United States.

"It provided for the appointment of the governor and three judges of the court, who are authorized to adopt, for the temporary government of the district, such laws of the original States as might be adapted to its circumstances. But, as soon as the number of adult male inhabitants should amount to five thousand, they were authorized to elect representatives to a House of Representatives, who were required to nominate ten persons from whom Congress should select five to constitute a legislative council; and the house and the council thus selected and appointed were thenceforth to constitute the legislature of the Territory, which was authorized to elect a delegate in Congress with the right of debating, but not of voting. This legislature, subject to the negative of the governor and certain fundamental principles and provisions embodied in articles of compact, was clothed with the full power of legislation for the Territory."⁴³

When a territory becomes a State, Congress largely surrenders the power which it had over it, to the State itself,

⁴³ 13 Wallace, 441, 442. This case contains a full history of the organization and status of Territories.

for the form of its government which existed prior to that time ceases, and the State government takes its place. The territory has become a part of the Federal Union by reaching the position and dignity of a State in the Union.⁴⁴ But as it has become less subject to the power of Congress because it became a State, for the same reason it has become more subject to the provisions of the Constitution, for they are more binding upon a State than upon a territory. Judge Cooley, the eminent constitutional writer, said:

"The Constitution was made for the States, not for territories. It confers power to govern territories, but in exercising this the United States is a sovereign dealing with dependent territory according as in its wisdom shall seem politic, wise and just, having regard to its own interests, as well as to those of the people of the territories."⁴⁵

A study of the proceedings of the Convention which framed our Constitution will show that territorial forms of government were not recognized by that body. On the subject of territory this clause of the Constitution is all there is in that instrument. It is apparent from the history of the clause that the framers of the Constitution meant to confer upon Congress power over *mere territory*—*mere domain*—and that it was not referring to a territory as that word is now understood. This view is supported by the decision of the Supreme Court of the United States in *United States v. Gratiot*,⁴⁶ where the court, in construing this clause, said: "The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word 'lands.'"

From 1789, when the Constitution went into operation, until 1803, there was no construction of this provision by the executive or legislative branch of the government, but in 1803 President Jefferson purchased from Napoleon what is known as the Louisiana Territory. In making this purchase Jefferson forced the question of his constitutional right to do so upon Congress. The Senate, by a vote of

⁴⁴ *Huse v. Glover*, 119 U. S. 543-546.

⁴⁵ *General Principles of Constitutional Law*, 35.

⁴⁶ 14 Peters, 526.

twenty-four to seven, decided that the power existed, while the vote in the House which appropriated the money for the purchase was ninety in favor of it and twenty-five against it.

Mr. Jefferson consulted his Attorney-General, Mr. Levi Lincoln, concerning the acquisition, but that officer, while not denying the power to acquire the territory, suggested that it be done in a different manner from that proposed by Mr. Jefferson.⁴⁷ Mr. Jefferson then wrote Mr. Gallatin, his Secretary of the Treasury, who on January 13, 1803, replied as follows:

"Does any constitutional objection really exist? To me it would appear: First, that the United States, as a nation, have an inherent right to acquire territory. Second, that whenever that acquisition is by treaty, the same constituted authorities in whom the treaty-making power is vested have a constitutional right to sanction the acquisition. Third, that whenever the territory has been acquired Congress has the power either of admitting it into the Union as a new State, or of annexing it to the State, with the consent of that State, or of making regulations for the government of such territory."⁴⁸

To this Mr. Jefferson replied: "You are right, in my opinion. There is no constitutional difficulty as to the acquisition of territory, and whether, when acquired, it may be taken into the Union by the Constitution as it now stands will become a question of expediency. I think it will be safer not to permit the enlargement of the Union but by amendment of the Constitution."⁴⁹

This opinion of Gallatin, expressed more than a century ago, which Jefferson yielded to at a later day, and which the courts have sustained, turned the current of our national thought from the narrow to the broad view of constitutional construction on the question of acquiring national territory.

Mr. Jefferson's later correspondence shows he entertained doubt as to the power of the government under the Constitution to hold the territory after its acquisition, and

⁴⁷ Doc. Hist. Con., vol. 5, 260.

⁴⁸ Writings of Albert Gallatin, vol. 1, 113.

⁴⁹ Writings of Albert Gallatin, vol. 1, 115.

also as to the power to incorporate it into the Union, although his treaty with Napoleon expressly stipulated that the inhabitants of the ceded territory should be taken into the Union.

On August 10, 1803, he wrote Thomas Paine as follows: "We shall undoubtedly lay the cession before both Houses, because both have important functions to exercise on it. The representatives are to decide on the payment of the money. Besides this I believe we must lay it before *the nation* and ask an additional article to the Constitution. That has made no provision for holding foreign territory, and still less for incorporating foreign countries into our Union. Yet we have stipulated that the Louisianians shall come into our Union. In making this stipulation, the Executive has done an act beyond the Constitution, and in ratifying it and paying for the country the legislature will do the same. We must throw ourselves for this on our country, saying that we have not hesitated to do for them what we were sure they would have done for themselves, by securing a great good in the only way which would ever have been in their power by asking their confirmation after the act, for which they would have given previous authority had it been foreseen; acknowledging at the same time that we cannot have bound them; that they are free to reject it, and to disavow us, restoring everything to its former state. But I trust we shall meet their approbation, and not their disavowal."⁵⁰

Two days later, August 12, he wrote Mr. Breckenridge to the same effect concerning his doubt as to the constitutionality of holding the territory and incorporating the inhabitants into the Union, and added:

"The inhabited part of Louisiana, from Point Coupee to the sea will, of course, be made a territorial government, and soon a State. But above that, the best use we can make of the country for some time, will be to give establishments in it to the Indians on the east side of the Mississippi, in exchange for their present country, and open land offices in the East, and thus make this acquisition the means of filling up the eastern side, instead of drawing off its population. When we shall be full on this side, we

⁵⁰ Doc. Hist. Con., vol. 5, 277.

may lay off a range of States on the western bank from the head to the mouth, and so range after range, advancing compactly as we multiply."⁵¹

This letter shows it was Jefferson's purpose that the territory acquired from France should be organized into territories from time to time, and as the inhabitants acquired the requisite qualifications, it should be admitted as States into the Union; and this course was pursued by the government. Portions of the purchase were from time to time erected into territories, and subsequently into States until the whole of the vast domain embraced in the purchase was admitted as States into the Union, the last one, one hundred and three years after the purchase.

Jefferson about this time prepared two amendments to the Constitution, authorizing the United States to incorporate territory acquired from foreign nations into the Union, but neither of them was adopted, if they were ever introduced in Congress.

On September 23, following, Mr. Paine replied as follows to Mr. Jefferson's letter:

⁵¹ Ford's Writings of Jefferson, vol. 10, 410.

Chief Justice Chase in *Clinton v. Englebrecht*, *supra*, said: "Upon the acquisition of the foreign territory of Louisiana, in 1803, the plan for the organization of the government was somewhat changed. The governor and council of the Territory of Orleans, which afterwards became the State of Louisiana, were appointed by the President, but were invested with full legislative powers, except as specially limited. A District Court of the United States distinct from the courts of the Territory was instituted. The rest of the Territory was called the District of Louisiana, and was placed under the government of the Governor and judges of Indiana."

John Quincy Adams said: "The Louisiana purchase was in substance a dissolution and recomposition of the whole Union. It made a Union totally different from that for which the Constitution had been formed. It gives despotic powers over the territories purchased. It naturalizes foreign nations in a mass. It makes French and Spanish laws a part of the laws of the Union. It introduces whole systems of legislation abhorrent to the spirit and character of our institutions, and all this done by an Administration which came in blowing a trumpet against implied powers. After this, to nibble at a bank, a road, a canal, the mere mint and cumins of the law, was but glorious inconsistency." *Memoirs of John Q. Adams*, vol. 5, 407.

He also said, "The annexation was an assumption of implied powers greater in its consequences than all the assumption of implied power in the twelve years of Washington's and Adams' administrations put together." Cited in *Ames on Amendments*, 179—notes.

"I do not suppose that the framers of the Constitution thought anything about the acquisition of new territory, and even if they did it was prudent to say nothing about it, as it might have suggested to foreign nations the idea that we contemplate foreign conquest. It appears to me to be one of those cases with which the Constitution had nothing to do, and which can be judged of only by the circumstances of the times when such a case shall occur. The Constitution could not foresee that Spain would cede Louisiana to France or to England, and therefore it could not determine what our conduct should be in consequence of such an event. The cession makes no alteration in the Constitution; it only extends the principles of it over a larger territory, and this certainly is within the morality of the Constitution, and not contrary to, nor beyond, the expression or intention of any of its articles. That the idea of extending the territory of the United States was always contemplated, whenever the opportunity offered itself, is, I think, evident from the opinion that has existed from the commencement of the Revolution that Canada would, at some time or other, become a part of the United States; and there is an article either in the treaty with France, or in some correspondence with that government, that in case of a conquest of Canada by the assistance of France, Canada should become a part of the United States, and therefore the cession of Louisiana says no more than what was said before with respect to Canada. The only difference between the two cases, for with respect to the Constitution there is none, is, that the first, that of Canada, was generous; and the stipulation that *the Louisianians shall come into our Union* was politic. It precludes us from selling the territory to another power that might become the enemy of France or Spain or both. It was like saying I will sell the territory to you for so much on *condition* that it is for yourselves, but not as land-jobbers to sell it again. It is an item in the purchase with which the Constitution has nothing to do, and it would only confuse and puzzle the people to know why it was questioned."⁵²

Government of acquired territory.—As has been said, the

⁵² Doc. Hist. Con., vol. 5, 286.

provisions of the Constitution on the acquisition of territory are exceedingly limited, and they are more so, concerning the government of territory after it is acquired. We wonder now that the framers of that instrument said so little upon so great and important a subject, but it was not so great when the Constitution was being framed as it has since become. The word "territories" does not appear in the Constitution. Such political sub-divisions did not engage the attention of its framers. What the Constitution dealt with in this clause was territory, domain, land. The "territory" or "other property belonging to the United States" is what Congress is given "power to dispose of and make all needful rules and regulations respecting." It is very probable that the framers of the Constitution had no dream of the future empire which would be built on this continent and become subject to the instrument they were framing.

In *Downes v. Bidwell*, Mr. Justice Brown, in delivering the opinion of a majority of the court, said on this subject:

"In passing upon the questions involved in this case and kindred cases, we ought not to overlook the fact that, while the Constitution was intended to establish a permanent form of government for the States which should elect to take advantage of its conditions and continue for an indefinite future, the vast possibilities of that future could never have entered the minds of its framers. The States had but recently emerged from a war with one of the most powerful nations of Europe; were disheartened by the failure of the Confederacy, and were doubtful as to the feasibility of a stronger union. Their territory was confined to a narrow strip of land on the Atlantic coast from Canada to Florida, with a somewhat indefinite claim to territory beyond the Alleghanies, where their sovereignty was disputed by tribes of hostile Indians, supported, as was popularly believed, by the British, who had never formally delivered possession under the treaty of peace. The vast territory beyond the Mississippi, which formerly had been claimed by France, since 1762 had belonged to Spain, still a powerful nation, and the owner of a great part of the Western Hemisphere. Under these circumstances it is little wonder that the question of annexing these territories was not made a subject of debate. The

difficulties of bringing about a union of the States were so great, the objections to it seemed so formidable, that the whole thought of the Convention centered upon surmounting these obstacles. The question of territories was dismissed without a single clause, apparently applicable only to the territories then existing, giving Congress the power to govern and dispose of them."⁵³

After the settlement of the questions arising out of the purchase of the Louisiana territory the subject of acquiring territory did not attract special attention until the acquisition of the territory which the United States got from Mexico as the result of the Mexican war, when it again came up and reached the dignity of a great national question. On February 21, 1849, Senator Walker introduced in the Senate an amendment to a bill providing "That all acts of a public and general character whose provisions can be made to apply to the territory west of the Rio del Norte, acquired from Mexico by treaty, be extended over and made in full force and efficacy in all said territory." On the following day he introduced as an amendment to his bill, "That the Constitution of the United States, and

⁵³ 182 U. S. 284.

John Quincy Adams has left the following account of an incident which occurred while he was Secretary of State: "At the office, the Committee from the Colonization Society, General John Mason, Walter Jones and Francis S. Key, came and renewed the subject. Jones argued that the late Slave Trade Act contained a clear authority to settle a colony in Africa, and that the purchase of Louisiana, and the settlement at the mouth of Columbia River, placed beyond all question the right of acquiring territory as existing in the Government of the United States.

"I treated these gentlemen with all possible civility, but gave them distinctly to understand that the late Slave Trade Act had no reference to the settlement of a colony, and that the acquisition of Louisiana, and the establishment at the mouth of Columbia River, being in territory contiguous to and continuous with our own, could by no means warrant the purchase of countries beyond the seas, or the establishment of a colonial system of government subordinate to and dependent upon that of the United States. To derive powers competent to this from the Slave Trade Act was an Indian cosmogony; it was mounting the world upon an elephant and the elephant on a tortoise, with nothing for the tortoise to stand upon.

"They took leave of me with good humor, but satisfied, I believe, that they would have no aid from me. A politician would have flattered them." *Memoirs of John Quincy Adams*, vol. 4, 293, 294.

the several acts of Congress respecting the registering, recording, etc., be and are extended over and given full force and efficacy in all of said territory.”⁵⁴ The introduction of the resolution and amendment caused an extended and most important discussion of the relation of the Constitution to the territories, and whether the Constitution went to newly acquired territory of its own strength, or should be extended to such territory by an act of Congress. The debate on the question has become of historical importance, the champions of the respective sides being Mr. Calhoun and Mr. Webster. Mr. Calhoun maintained that the Constitution went of its own strength and force into new territory. Mr. Webster contended that the Constitution did not of its own force and strength go into such territory. In the course of the debate Mr. Webster said:

“It is of importance that we seek to get some conception of what is meant by the proposition, in a law to ‘extend the Constitution of the United States to the territories.’ Why, sir; the thing is utterly impossible. All the legislation in the world, in this general form, could not accomplish it. . . . In this general way there is no such thing as extending the Constitution. The Constitution is extended over the United States and over nothing else, and can extend over nothing else. It cannot be extended over anything except over the old States and the new States that shall come in hereafter, when they do come in. There is a want of accuracy of ideas in this respect that is quite remarkable among eminent gentlemen, and especially among professional and judicial gentlemen. It seems to be taken for granted that the right of trial by jury, the *habeas corpus*, and every principle designed to protect personal liberty, is extended by force of the Constitution itself over every new territory. That proposition cannot be maintained at all. . . . I do not say that while we sit here to make laws for these territories, we are not bound by every one of those great principles which are intended as general securities for public liberty. But they do not exist in territories until endorsed by the authority of Congress. These principles do not, *proprio vigore*, apply

⁵⁴ Cong. Globe, Appendix, vol. 18 (1848-9), 561.

to any of the territories of the United States, because that territory, while a territory, does not become a part, and is no part of the United States.'"⁵⁵

The question rested after this discussion until the Supreme Court considered it in the great case of *Dred Scott v. Sanford*,⁵⁶ where Chief Justice Taney for a majority of the court said:

"There is certainly no power given by the Constitution to the Federal Government to establish or maintain colonies bordering on the United States or at a distance, to be ruled and governed at its own pleasure; nor to enlarge its territorial limits in any way, except by the admission of new States. But no power is given to acquire a territory to be held and governed permanently in that character."

By this the learned Chief Justice must have meant that there is no power in Congress to acquire and hold territory with the intention of *never* incorporating it into the Federal Union as a State, otherwise his language would be inconsistent with a subsequent portion of his opinion, in which he said:

"The power to expand the territory of the United States by the admission of new States is plainly given; and in the construction of this power by all the departments of the government, it has been held to authorize the acquisition of territory, not fit for admission at the time, but to be admitted as soon as its population and situation would entitle it to admission. It is acquired to become a State, and not to be held as a colony and governed by Congress with absolute authority; and as the propriety of admitting a new State is committed to the sound discretion of Congress, the power to acquire territory for that purpose, to be held by the United States until it is in a suitable condition to become a State upon an equal footing with the other States, must rest upon the same discretion. It is a question for the political department of the government, and not the judicial; and whatever the political department of the government shall recognize as within the limits of the United States the judicial department is also bound to recognize and to administer in it the laws of the

⁵⁵ Cong. Globe and Appendix, vol. 18 (1848-9), 272-274.

⁵⁶ 19 Howard, 446, 447.

United States, so far as they apply, and to maintain in the territory the authority and rights of the government, and also the personal rights and rights of property of individual citizens, as secured by the Constitution."

Further the Chief Justice said: "The power of Congress over the person or property of a citizen can never be a mere discretionary power under our Constitution and form of government. The powers of the government and the rights and privileges of the citizens are regulated and plainly defined by the Constitution itself. And when the territory becomes a part of the United States, the Federal Government enters into possession in the character impressed upon it by those who created it. It enters upon it with its powers over the citizens strictly defined, and limited by the Constitution, from which it derives its own existence, and by virtue of which alone it continues to exist and act as a government and sovereignty. It has no power of any kind beyond it; and it cannot, when it enters a territory of the United States, put off its character and assume discretionary or despotic powers which the Constitution has denied to it. It cannot create for itself a new character separated from the citizens of the United States and the duties it owes them under the provisions of the Constitution. The territory being a part of the United States, the government and the citizen both enter it under the authority of the Constitution, with their respective rights defined and marked out; and the federal government can exercise no power over his person or property beyond what that instrument confers, nor lawfully deny any right which it has reserved."⁵⁷

As illustrations of the limitations of the power of Congress over a territory the Chief Justice used this language:

"No one, we presume, will contend that Congress can make any law in a territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the territory peaceably to assemble, and to petition the government for the redress of grievances. Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one

⁵⁷ 19 Howard, 449.

to be a witness against himself in a criminal proceeding. . . . Nor could it, by any act which it might pass, quarter a soldier in time of peace in a house in a territory without the consent of the owner; nor in time of war except as prescribed by law; nor take private property for public use without just compensation."⁵⁸

This is in keeping with the views of Mr. Justice Bradley in the great case of the Mormon Church, where he said: "In legislating for the territories Congress would doubtless be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments but these limitations would exist rather by inference and the general spirit of the Constitution, from which Congress derives all its powers, than by any express and direct application of its provisions."⁵⁹

It will be observed that the limitations upon the power of Congress over the territories and the people of the territories are the same as those contained in the early amendments to the Constitution, commonly known as the Bill of Rights, and which are limitations upon the power of the federal government.

The question did not again become important until more than sixty years after the decision in the Dred Scott case, when the United States acquired the Philippine Islands and Porto Rico from Spain and when it came before the Supreme Court in a number of cases, the leading one being *Downes v. Bidwell*,⁶⁰ Mr. Justice Brown, who delivered the opinion in the case said (p. 278):

"The practical interpretation put by Congress upon the Constitution has been long continued and uniform to the effect that the Constitution is applicable to territories acquired by purchase or conquest only when and so far as Congress shall so direct. Notwithstanding its duty to 'guarantee to every State in this Union a republican form of government' (Art. IV, Sec. 4), by which we understand, according to the definition of Webster, 'a government in which the supreme power resides in the whole body of the people, and is exercised by representatives

⁵⁸ 19 Howard, 450.

⁵⁹ *Mormon Church v. United States*, 136 U. S. 1.

⁶⁰ 182 U. S., 244.

elected by them,' Congress did not hesitate, in the original organization of the territories of Louisiana, Florida, the Northwest Territory and its subdivisions of Ohio, Indiana, Michigan, Illinois and Wisconsin, and still more recently in the case of Alaska, to establish a form of government bearing a much greater analogy to a British crown colony than a republican State of America, and to vest the legislative power either in a governor and council, or a governor and judges, to be appointed by the President. It was not until they had attained a certain population that power was given them to organize a legislature by vote of the people. In all these cases, as well as in Territories subsequently organized west of the Mississippi, Congress thought it necessary either to extend the Constitution and laws of the United States over them, or to declare that the inhabitants should be entitled to enjoy the right of trial by jury, or bail, and of the privilege of the writ of *habeas corpus*, as well as other privileges of the Bill of Rights."

Mr. Justice White delivered a separate opinion, in which he concurred in the result reached by Mr. Justice Brown, but in which he laid down the following propositions (p. 289):

"Every function of the government being derived from the Constitution, it follows that that instrument is everywhere and at all times potential in so far as its provisions are applicable. The Constitution has undoubtedly conferred on Congress the right to create such municipal organizations as it may deem best for all the territories of the United States, whether they have been incorporated or not, to give to the inhabitants as respects the local governments such degree of representation as may be conducive to the public well being, to deprive such territory of representative government if it is considered just to do so, and to change such local government at discretion. . . . As Congress in governing the territories is subject to the Constitution, it results that all the limitations of the Constitution which are applicable to Congress in exercising its authority necessarily limit its power on this subject."

Mr. Justice Shiras and Mr. Justice McKenna concurred in the opinion of Mr. Justice White, and Mr. Justice Gray also concurred with Mr. Justice White, in a separate opinion in which he said (p. 345):

"The cases now before the court do not touch the authority of the United States over the territories, in the strict and technical sense, being those which lie within the United States, and the territories of Alaska and Hawaii; but they relate to territory, in the broader sense, acquired by the United States by war with a foreign State. . . . The civil government of the United States cannot extend immediately, and of its own force, over territory acquired by war. Such territory must necessarily, in the first instance, be governed by the military power under the control of the President as commander in chief. Civil government cannot take effect at once, as soon as possession is acquired under military authority, or even as soon as that possession is confirmed by treaty, it can only be put in operation by the action of the appropriate political department of the government at such time and in such degree as that department may determine. There must, of necessity, be a transition period. In a conquered territory, civil government must take effect either by the action of the treaty-making power, or by that of the Congress of the United States. . . . So long as Congress has not incorporated the territory into the United States neither military occupation nor cession by treaty makes the conquered territory domestic territory, in the sense of the revenue laws. But those laws concerning 'foreign countries' remain applicable to the conquered territory until changed by Congress. . . . If Congress is not ready to construct a complete government for the conquered territory, it may establish a temporary government, which is not subject to all the restrictions of the Constitution."

Chief Justice Fuller and Justices Harlan, Brewer and Peckham dissented, the Chief Justice and Mr. Justice Harlan writing dissenting opinions. None of the opinions received the support of a majority of the court. The conclusion of Mr. Justice White, in which Mr. Justice Shiras, Mr. Justice McKenna and Mr. Justice Gray substantially concurred, while not strictly a dissent from the opinion of Mr. Justice Brown, was reached by a different process of reasoning and can only be regarded as a separate opinion on the subject. Both it and the opinion of Mr. Jus-

tice Brown seem to have been modified by subsequent decisions.

The subject next came up in *Dorr v. United States*, the question being, as stated by Mr. Justice Day, who delivered the opinion, whether in the absence of congressional enactment giving the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where a demand for a jury trial made by the defendant and refused by the courts of the Islands. After referring to the cases of *DeLima v. Bidwell* and *Downes v. Bidwell*, Mr. Justice Day said (p. 140):

"It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the federal government.

. . . It is equally well settled that the United States may acquire territory in the exercise of the treaty-making power by direct cession as the result of war, and in making effectual the terms of peace; and for that purpose has the powers of other sovereign nations."

The Justice continued (p. 142): "While Congress may make laws for the government of territories, without being subject to all the restrictions which are imposed upon that body when passing laws for the United States, considered as a political body of States in union, the exercise of the power expressly granted to govern the territories is not without limitations. . . . In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the 'prohibitions' of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory, which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*.⁶¹ Until Congress shall see fit to incorporate

⁶¹ 182 U. S. 244.

territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation."

This reached the great and vital question. It decided that "ceded territory" is of two kinds; that which is incorporated into the United States, and that which is not.

Mr. Justice Day concluded this portion of his opinion⁶² as follows: "The power to govern territory does not require Congress to enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury, and that the Constitution does not, without legislation and of its own force, carry such right to territory so situated."

The plain lesson of this decision is that the Constitution applies to ceded territory which has been incorporated into the United States, but it does not apply to territory which has been annexed but not incorporated into the Union, unless taken there by congressional action.

The question again came before the court in *Rasmussen v. United States*,⁶³ in which Mr. Justice White, in delivering the opinion, said:

"Without attempting to examine in detail the opinions in the various cases, in our judgment it clearly results from them that they substantially rested upon the proposition that where territory was a part of the United States the inhabitants thereof were entitled to the guarantee of the Fifth, Sixth and Seventh Amendments, and the act or acts of Congress purporting to extend the Constitution were considered as declaratory merely of the result which existed independently by the inherent operation of the Constitution."

Later the Supreme Court announced: "The civil government of the United States cannot extend immediately and of its own force over conquered and ceded territory. Theoretically, Congress might prepare and enact a scheme

⁶² 195 U. S. 149.

⁶³ 197 U. S. 516.

of civil government to take effect immediately upon the cession, but, practically, there always have been delays and always will be. Time is required for a study of the situation and for the maturing and enacting of an adequate scheme of civil government. In the meantime, pending the action of Congress, there is no civil power under our system of government, not even that of the President as civil executive, which can take the place of the government which has ceased to exist by the cession. Is it possible that, under such circumstances, there must be an *interregnum*? We think clearly not. The authority to govern such ceded territory is found in the laws applicable to conquest and cession. That authority is the military power, under the control of the President as commander-in-chief. In the case of *Cross v. Harrison*, 16 How. 164, a situation of this kind was referred to in the opinion of the court, where it said: 'It (the military authority) was the government when the territory was ceded as a conquest, and it did not cease, as a matter of course, or as a necessary consequence of the restoration of peace. The President might have dissolved it by withdrawing the army and navy officers who administered it, but he did not do so. Congress could have put an end to it, but that was not done. The right inference from the inaction of both is that it was meant to be continued until it had been legislatively changed. No presumption of a contrary intention can be made. Whatever may have been the causes of delay, it must be presumed that the delay was consistent with the true policy of the Government' (pp. 193, 194). The authority of a military government during the period between the cession and action of Congress, like the authority of the same government before the cession, is of large, though it may not be of unlimited extent."⁶⁴

Summing up the result of the decisions on this important and most controverted question, the following doctrine seems to be established. Foreign territory acquired by the United States is subject to two classifications: First, territory which is incorporated into the United States. This is subject to the provisions of the Constitution, and its people are entitled to its benefits, including the Bill of

⁶⁴ *Santiago v. Noguerras*, 214 U. S., 260, 265.

Rights, commonly known as the first ten amendments. Second: territory which is not incorporated into the United States, but which may be regarded as outlying territory. This is subject to be governed by Congress under the powers granted in the Constitution applicable to such territory, not necessarily including all the provisions of the Bill of Rights, but subject to such limitations upon Congressional action as inhere in the "prohibitions" of the Constitution. The United States has full power to hold annexed territory until its inhabitants are qualified to become citizens thereof, and Congress may determine how long that period shall continue. After Congress has acquired territory by conquest or cession the civil government of the United States cannot immediately extend to it of its own force, but in the meantime, until the civil government can extend to it, the President may govern it under his authority as commander-in-chief of the military forces of the United States.

Since the above chapter was written Congress has provided for the admission of the last of the Territories as States into the Union. When this is accomplished there will be forty-eight States. Three were formed from original States, fourteen from original territory of the United States outside the thirteen States, and eighteen from territory acquired by the United States from foreign nations.

This last acquisition contrasts strongly with the views of some of our early statesmen. Josiah Quincy, referring to Mr. Jefferson's purchase of Louisiana, said:

"He coupled it with a design insidious and unprincipled. The clause in the Constitution giving the power to Congress to admit into the Union other States, had unquestionably sole reference to the admission of States within the limits of the original territory of the United States. No original document, argument, or treatise, at the time of the formation of the Constitution, can be adduced to give color to the opinion that it was intended to extend to territories then belonging to foreign powers, beyond the limits of the original thirteen States. . . . By this act, as was then foreseen, and the result has proved, Jefferson unsettled and spread the whole foundations of the Union, as established by the original Constitution of the United States, introduced a population alien to it in every element of character, previous education, and political tendency. Had his policy terminated with this result, it would have been sufficiently unprincipled, though less injurious; but it was far-reaching into the future, and in its effects on the destinies of the Union."—*Life of Josiah Quincy*, 89-91.

CHAPTER XLVIII.

GUARANTEE OF A REPUBLICAN FORM OF GOVERNMENT TO EVERY STATE—AMENDMENTS, HOW PROPOSED.

The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

This clause is attributable to Mr. Wilson but was enlarged by the Committee of Detail. It seems to have been a well defined purpose of the Convention that the general government should guarantee to each of the States a republican form of government. This was probably due to the fact that the absence of a similar guarantee in the Articles of Confederation was considered one of their greatest defects and sources of weakness. Perhaps it was also somewhat due to the domestic trouble, or insurrection, which occurred in Massachusetts in 1787, and which threatened to overthrow the State government and possibly involve the nation in a violent struggle. The lesson which the nation learned from this experience in a single State was certainly an important one, for it taught the people how valuable would be the assistance of the general government in the event such an experience should be repeated. This clause is one of the most important in the Constitution, and few provisions in that instrument did more to strengthen the feeling of reliance upon the power of the general government by the individual States. When it was inserted in the Constitution that the United States would guarantee to every State in the Union a republican form of government and protect each of them against invasion, and, when applied to by the legislature, or executive of a State, against domestic violence, the States and the people were justified in feeling that they could safely rely upon their guarantor and protector, which

was the general government. The members of the Convention evidently expected some article bearing upon the question to be presented for their consideration. They were not disappointed.

The plan of Mr. Randolph provided: "A republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State."¹

While the plan of Mr. Pinckney did not go as far as that of Mr. Randolph, it contained an article that, "On the application of the legislature of a State, the United States shall protect it against domestic insurrection."²

In Committee of the Whole Mr. Randolph's resolution was changed to read: "A republican Constitution, and its existing laws ought to be guaranteed to each State by the United States,"³ and in this form it was adopted unanimously by the committee and reported by it to the Convention.⁴ When it came up for consideration before the Convention it caused some debate and opposition.

Mr. Gouverneur Morris objected for the reason that he did not wish to guarantee such laws as existed in some of the States—naming Rhode Island.

Mr. Wilson said: "The object of the resolution is merely to secure the States against dangerous commotions, insurrections and rebellions."

Col. Mason observed: "If the General Government should have no right to suppress rebellions against particular States, it would be in a bad situation. As rebellions against itself originate in and against individual States, it must remain a passive spectator of its own subversion."

Mr. Randolph remarked: "The resolution has two objects—first, to secure a republican government; second, to suppress domestic commotions." He urged the necessity of both of these provisions.

Mr. Madison moved to substitute the following words: "That the constitutional authority of the States shall be

¹ Journal, 63.

² Journal, 72.

³ Journal, 149.

⁴ Journal, 162.

guaranteed to them respectively against domestic as well as foreign violence.”^s

This was objected to by Mr. Houston, who was afraid of perpetuating the existing constitutions of the States, as some of them were very bad.

Mr. Luther Martin was in favor of leaving the States to suppress rebellions.

Mr. Gorham thought it “strange that a rebellion should be known to exist in the empire, and the General Government should be restrained from interposing to subdue it. An enterprising citizen might erect the standard of monarchy in a particular State, might gather together partisans from all quarters, might extend his views from State to State and threaten to establish a tyranny over the whole, and the General Government be compelled to remain an inactive witness to its own destruction. With regard to different parties in a State, as long as they confine their disputes to words, they will be harmless to the General Government and to each other. If they appeal to the sword, it will then be necessary for the General Government, however difficult it may be, to decide on the merits of their contest, to interpose and put an end to it.”

Mr. Carroll said: “Some such provision is essential. Every State ought to wish for it.”

Mr. Randolph moved to add as an amendment to the motion the words, “and that no State be at liberty to form any other than a republican government.” This motion was seconded by Mr. Madison.

Mr. Rutledge thought it unnecessary to insert any guarantee. No doubt could be entertained but that Congress had the authority, if they had the means, to cooperate with any State in subduing a rebellion; it was and would be involved in the nature of the thing.

Mr. Wilson then moved, as a better expression of the idea, “That a republican form of government shall be guaranteed to each State; and that each State shall be protected against foreign and domestic violence.”

This motion was well received by the Convention, and thereupon Mr. Madison and Mr. Randolph withdrew their propositions, and Mr. Wilson’s motion was adopted with-

^s Journal, 380, 381.

out opposition.⁶ In that form it was referred to the Committee of Detail.⁷ That committee reported the article back to the Convention as follows: "The United States shall guarantee to each State a republican form of government; and shall protect each State against foreign invasions, and, on the application of its legislature, against domestic violence."⁸ In the Convention the word "foreign" was unanimously stricken out as superfluous, being implied in the term "invasion."⁹

Mr. Dickinson then moved to strike out the words, "on the application of its legislature, against." This would have made the article read: "The United States shall guarantee to each State a republican form of government, and shall protect each State against foreign invasions and domestic violence." He thought it essential to the tranquillity of the United States that they in all cases suppress domestic violence from whatever source it proceeded. But his motion did not prevail. He also wished to strike out the words "domestic violence" and insert "insurrections," but this motion failed.

He likewise moved to insert the words, "or Executive," after the words "application of its legislature," giving as his reason that the occasion itself might hinder the legislature from meeting. This amendment prevailed by a vote of eight States to two.¹⁰

Mr. Luther Martin suggested adding the words, "in the recess of the legislature." This received only the vote of Maryland. As thus amended the article went to the Committee on Style, who reported it as follows: "The United States shall guarantee to every State in this Union a republican form of government; and shall protect each of them against invasion; and, on application of the Legislature or Executive, against domestic violence."¹¹ When this report came before the Convention the words, "when the legislature cannot be convened," were inserted after the word

⁶ Journal, 382.

⁷ Journal, 448.

⁸ Journal, 460.

⁹ Journal, 639.

¹⁰ Journal, 639.

¹¹ Journal, 712.

“Executive,”¹² and thus amended the article became a part of the Constitution.

The benefits of the guarantee provided by this clause are admirably stated by Mr. Madison in the *Federalist*, and, Mr. Justice Story says, “with so much force and propriety, that it supersedes all further reasoning.”¹³

“In a confederacy founded on republican principles, and composed of republican members, the superintending Government ought clearly to possess authority to defend the system against aristocratic or monarchical innovations. The more intimate the nature of such a union may be, the greater interest have the members in the political institutions of each other; and the greater right to insist, that the forms of government under which the compact was entered into, should be *substantially* maintained. But a right implies a remedy; and where else could the remedy be deposited than where it is deposited by the Constitution? Governments of dissimilar principles and forms have been found less adapted to a Federal coalition of any sort than those of a kindred nature. ‘As the Confederate Republic of Germany,’ says Montesquieu, ‘consists of free cities and petty states, subject to different princes, experience shows us that it is more imperfect than that of Holland and Switzerland.’ ‘Greece was undone,’ he adds, ‘as soon as the king of Macedon obtained a seat among the *Amphictyons*.’” In the latter case, no doubt, the disproportionate force, as well as the monarchical form, of the new confederate, had its share of influence on the events.

“It may possibly be asked, what need there could be of such a precaution, and whether it may not become a pretext for alteration in the State Governments, without the concurrence of the States themselves. These questions admit of ready answers. If the interposition of the General Government should not be needed, the provision for such an event will be a harmless superfluity only in the Constitution. But who can say what experiments may be produced by the caprice of particular States, by the ambition of enterprising leaders, or by the intrigues and influence of foreign powers? To the second question, it may be an-

¹² Journal, 736.

¹³ The *Federalist*, No. 43.

swered that, if the General Government should interpose by virtue of this constitutional authority, it will be of course bound to pursue the authority. But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to do so, and to claim the Federal guaranty for the latter. The only restriction imposed on them is, that they shall not exchange republican for anti-republican constitutions; a restriction which, it is presumed, will hardly be considered as a grievance."

By the United States is meant the greater government—the whole of the States united—and these are to guarantee to each State among the United States, that is, to every State in the Federal Union, a republican form of government. The term State as used in this clause was held by Chief Justice Chase in *Texas v. White*,¹⁴ to mean, "a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States, under a common constitution, which forms the distinct and greater political unit, which that Constitution designates as the United States."

Congress determines when a State has a republican form of government.—The Constitution does not define what shall be called a republican form of government; nor does it state what department of the government shall settle the question. But as Congress must admit States into the Union and as each State must have a republican form of government, it is reasonable to conclude that upon Congress rests the responsibility of determining the matter.

In *Luther v. Borden*,¹⁵ Chief Justice Taney said: "As the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine

¹⁴ 7 Wallace, 721.

¹⁵ 7 Howard, 1, 42.

whether it is republican or not, and when the Senators and Representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the proper constitutional authority and its decision is binding on every other department of the government."

In reviewing this subject in *Minor v. Happersett*,¹⁶ Chief Justice Chase said: "The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended. The guaranty necessarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent, through their representatives. These governments the Constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed, that they were such as it was the duty of the States to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the Constitution."

In the early case of *Chisholm v. Georgia*, Mr. Justice Wilson (p. 457) defined a republican government to be one constructed on the principle that the supreme power resides in the body of the people.¹⁷ It is the form of government which the Constitution guarantees to be republican, and it was held in *In re Duncan*,¹⁸ that "the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves."

From these comments we may conclude that a republican form of government is one in which the people elect their law makers and their public officers. Mr. Justice Brown

¹⁶ 21 Wallace, 162, 175, 176.

¹⁷ 2 Dallas, 419.

¹⁸ 139 U. S. 449, 461.

in *Downes v. Bidwell* said: "A republican form of government is one in which the supreme power resides in the whole body of the people, and is exercised by the representatives elected by them."¹⁹

There is another question which grows out of this provision. What is the test by which a republican form of government is to be determined? When does a State have or cease to have a republican form of government? The United States is bound to guarantee to each State in the Union a form of government which is republican, but when is that requirement satisfied? Suppose a State shall say that it did not have a republican form of government and appeal to the United States to give it such a government. Under this clause by what test is the question to be determined?

Chief Justice Taney, in *Luther v. Borden*, said: "As the United States guarantees to each State a republican form of government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the Senators and Representatives of the States are admitted in the councils of the Union, the authority of the government under which they are appointed as well as its republican character is recognized by the proper constitutional authority."

A government known as the United States was formed by the union of the original thirteen States. At that time they were thirteen separate and independent sovereignties. After the Union they were one sovereignty; each State agreed to a general Constitution which guarantees to each State in the Union a republican form of government.

What form of government was understood by the framers of the Constitution to be meant by this guarantee? It is entirely probable that the States had in mind forms of government similar to those then existing. In other words a republican form of government within the meaning of this clause is to be tested by the question, whether or not such a government conforms to the State governments which existed at the time the Union was formed.

The question was somewhat touched upon by Mr. Web-

¹⁹ 182 U. S. 278, 279.

ster in his argument in Luther against Borden above cited. After quoting the constitutional guarantee as to a republican form of government he said:

"I cannot but think this a very stringent article, drawing after it the most important consequences, and all of them *good* consequences. The Constitution, in the section cited, speaks of States as having existing legislatures and existing executives; and it speaks of cases in which violence is practised or threatened against the State, in other words, 'domestic violence;' and it says the State shall be protected. It says, then, does it not, that the existing government of a State shall be protected. . . .

"The Constitution does not proceed on the *ground* of revolution; it does not proceed on any *right* of revolution; but it does go on the idea, that, within and under the Constitution, no new form of government can be established in any State, without the authority of the existing government. . . .

"Suppose three-fourths of the people of Rhode Island to have been engaged in it, and ready to sustain it. What then? How is it to be done without the consent of the previous government? How is the fact, that three-fourths of the people are in favor of the new government, to be legally ascertained? And if the existing government deny that fact, and if that government hold on, and will not surrender till displaced by force, and if it is threatened by force, then the case of the Constitution arises, and the United States must aid the government that is in, because an attempt to displace a government by force is 'domestic violence.' It is the exigency provided for by the Constitution. If the existing government maintain its post, though three-fourths of the State have adopted the new constitution is it not evident enough that the exigency arises in which the constitutional power here must go to the aid of the existing government? . . .

"But the law and the Constitution, the whole system of American institutions, do not contemplate a case in which a resort will be necessary to proceedings *aliunde*, or outside of the law and the Constitution, for the purpose of amending the frame of government. They go on the idea that the States are all republican, that they are all representative in their forms, and that these popular gov-

ernments in each State, the annually created creatures of the people, will give all proper facilities and necessary aids to bring about changes which the people may adjudge necessary in their constitutions. They take that ground and act on no other supposition. They assume that the popular will in all particulars will be accomplished. And history has proved that the presumption is well founded."²⁰

Mr. Calhoun expressed the opinion that, "The Federal government, in determining whether the government of a State be or be not republican within the meaning of the Constitution, has no right whatever in any case to look beyond its admission into the Union. From this fundamental restriction, another, deduced from it, necessarily follows, of no little importance,—that no change in its government, after its admission, can make it other than republican which does not essentially alter its form, or make it different in some essential particular from those of the other States at the time of their adoption. In other words, the forms of the governments of the several States composing the Union, as they stood at the time of their admission, are the proper standard by which to determine whether any after change in any of them makes its form of government other than republican."²¹

Mr. Reverdy Johnson expressed a similar view many years afterwards in the United States Senate: "There must be some mode by which you are to ascertain whether any government is republican in point of form, for this very obvious consideration: the United States are to guarantee to every State a republican form of government. ***

"There is a rule, and it is the only rule, as I think, consistent with what must have been the intention of the Convention and of the people, and that is this: that every government is republican in point of form which corresponds with the governments in existence when the Constitution was adopted. All rights secured by positive constitutional prohibitions, that were secured or prohibited in the several State constitutions of the States whose representatives framed the Constitution, and whose people adopted the Constitution, are perfectly consistent with our idea

²⁰ Webster's Works, vol. 6, 230, 231.

²¹ Cited in 2 Story on Constitution, p. 591—note.

and the people's idea of what constitutes a republican form of government. There is no other rule by which you can construe the clause that will not place every State in the power of the United States, exercising that power through the Congress of the United States which from time to time that body may think actually or professedly will conduce to the interest of the people of each State, and give them what they consider a government republican in point of form."²²

Judge Cooley says, "This view, so forcibly presented, is that which was practically accepted and acted upon up to the time when it became necessary to recognize and reconstruct State governments in the States which went into rebellion in 1861. By some leading men in Congress it was then contended that a government ought not to be regarded as republican in form which permitted slavery, or which excluded a portion of its citizens from participation in the government because of the color of the skin. The exigencies of the times made this doctrine acceptable. The reorganizing States were required to present constitutions forbidding slavery and establishing impartial suffrage. In the course of reconstruction, however, the question was warmly discussed whether, if the political departments of the government should erroneously, arbitrarily, and for partisan ends, determine and declare that a particular State government was not republican in form, and therefore should not be recognized, such State or its citizens could have any appeal to the judicial tribunals. It was not doubted that, if the case was one of a newly organized State applying for admission to the Union, the decision of Congress upon its admission, however erroneous, unjust, or arbitrary, would be one the conclusiveness of which would not be open to discussion. Congress having full power to admit or reject new States, the insufficiency of the reasons which may have governed its action cannot possibly affect its validity. But in other cases also it must be conceded that a State aggrieved by an unjust decision is equally without legal remedy. The courts cannot aid it, for upon political questions they must accept and follow the conclusions of the political department."²³

²² 2 Story, 592—note, 5th ed.

²³ Cited in Story on Constitution, vol. 2, 592, 593—note, 5th ed.

Protect them against invasion.—The obligation imposed upon the United States by this section does not stop with guaranteeing a republican form of government to each State in the Union, but includes the duty of protecting each of them against invasion. There is nothing in the Constitution to indicate what amounts to an invasion of a State, or how the United States is to be made aware of the necessity of protecting a State against invasion. In this respect the clause lacks the directness which is found in the next sentence as to domestic violence.

Mr. Madison said: "A protection against invasion is due from every society, to the parts composing it. The latitude of the expression here used, seems to secure each State not only against foreign hostility, but against ambitious or vindictive enterprises of its more powerful neighbors. The history both of ancient and modern confederacies proves that the weaker members of the Union ought not to be insensible to the policy of this article."²⁴

Congress is the proper branch of the government to determine the means with which a State may be protected against invasion and it may confer upon the President the right and power to decide when the necessity arises for the general government to interfere.²⁵

The President determines when the exigency exists for protection by the United States.—In *Martin v. Mott*,²⁶ Mr. Justice Story said: "We are all of opinion that the authority to decide whether the exigency has arisen belongs exclusively to the President, and that his decision is conclusive upon all other persons. We think that this construction necessarily results from the nature of the power itself, and from the manifest object contemplated by the act of Congress. The power itself is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union. A prompt and unhesitating obedience to orders is indispensable to the complete attainment of the object. The service is a military service, and the command of a military nature; and in such cases every delay and every

²⁴ The Federalist, No. 43.

²⁵ *Luther v. Borden*, 7 Howard, 42, 43.

²⁶ 12 Wheaton, 19, 30.

obstacle to an efficient and immediate compliance necessarily tend to jeopard the public interests."

Against domestic violence.—It is only upon the application of the legislature, or of the executive of a State (when the legislature cannot be convened), that the United States can protect a State against domestic violence—which means some internal trouble in the State which is beyond the control of the State authorities.

In *United States v. Cruikshank*,²⁷ it was said that it will not be claimed that the United States "have the power or are required to do mere police duty in the States." In that case the Court said the charges made were only a conspiracy to commit a breach of the peace, and it was not a proper case for interference by the United States, for it did not amount to domestic violence. Of this clause of the section Mr. Madison, has said:²⁸

"Protection against domestic violence is added with equal propriety. It has been remarked, that even among the Swiss cantons, which, properly speaking, are not under one government, provision is made for this object; and the history of that league informs us, that mutual aid is frequently claimed and afforded; and as well by the most democratic, as the other cantons. A recent and well known event among ourselves, has warned us to be prepared for emergencies of a like nature. Insurrections in a State will rarely induce a Federal interposition, unless the number concerned in them, bear some proportion to the friends of Government. It will be much better, that the violence in such cases should be repressed by the superintending power than that the majority should be left to maintain their cause, by a bloody and obstinate contest. The existence of a right to interpose, will generally prevent the necessity of exerting it.

"In cases where it may be doubtful on which side justice lies, what better umpires could be desired by two violent factions, flying to arms and tearing the State to pieces, than the representatives of confederate States, not heated by the local flame? To the impartiality of judges, they would unite the affection of friends. Happy would

²⁷ 92 U. S., 556.

²⁸ The Federalist, No. 43.

it be, if such a remedy for its infirmities could be enjoyed by all free governments; if a project equally effectual, could be established for the universal peace of mankind.

“Among the advantages of a confederate republic, enumerated by Montesquieu, an important one is, ‘Should a popular insurrection happen in one of the States, the others are able to quell it. Should abuses creep into one part, they are reformed by those that remain sound.’”

It was under this clause of the Constitution that Governor King of Rhode Island in 1842, on account of the condition existing as a result of the Dorr rebellion, made requisition on President Tyler for assistance and protection. To the demand of the Governor, President Tyler, on the 11th of April, 1842, made the following reply:

“I have to assure your Excellency, that, should the time arrive (and my fervent prayer is, that it may never come), when an insurrection shall exist against the government of Rhode Island, and a requisition shall be made upon the Executive of the United States to furnish that protection which is guaranteed to each State by the Constitution and laws, *I shall not be found to shrink from the performance of a duty which, while it would be the most painful, is at the same time the most imperative.* I have also to say, that, in such a contingency, the Executive could not look into real or supposed defects of the existing government, in order to ascertain whether some other plan of government proposed for adoption was better suited to the wants and more in accordance with the wishes of any portion of her citizens. To throw the executive power of this government into any such controversy would be to make the President the armed arbitrator between the people of the different States and their constituted authorities, and might lead to an usurped power, dangerous alike to the stability of the State governments and the liberties of the people.

“It will be my duty, on the contrary, to respect the requisitions of that government which has been recognized as the existing government of the State through all time past, until I shall be advised, in regular manner, that it has been altered and abolished, and another substituted in its place, by legal

*and peaceable proceedings, adopted and pursued by the authorities and people of the State."*²⁹

An interesting and instructive case arose under the last clause of this section in 1908. In the State of Nevada serious troubles had arisen which were liable to result in violence and great destruction to life and property. The State had no enrolled militia. The sheriff of the county seemed unable to cope with the situation. After reciting the condition of affairs to the President, the Governor of the State asked him, "If you can consistently give us assurance that we may depend upon immediate relief from the Presidio Barracks." To this the President replied: "The Federal Government is prepared to send troops at any moment, subject of course to your making call under conditions prescribed by Article 4, Section 4, of the Constitution of the United States and the Revised Statutes. The call of the Governor must itself recite such a condition of affairs in accordance with the terms of the laws referred to as will warrant the President in acting."

On the following day the Governor again addressed the President:

"There do now exist domestic violence and unlawful combinations and conspiracies which do now so obstruct and continue to so obstruct and hinder the execution of the laws of this State; and to deprive and continue to deprive the people of a certain section of the State of the rights, privileges, immunities and protection named in the Constitution of the United States, and the constituted authorities of this State are now and continue to be unable to protect the people in such rights and the reason of such inability and the particulars thereof are the following, to wit, the unlawful dynamiting of property, commission of felonies, threats against the lives and property of law-abiding citizens, the unlawful possession of arms and ammunition and the confiscation of dynamite with threats of the unlawful use of the same by preconcerted action.

"Therefore, pursuant to Article 4, Section 4, of the Constitution of the United States, and section 5297 and 5298 of the Revised Statutes, I respectfully request that Your Excellency send two companies of the Army of the United

²⁹ North American Review, No. 58, New Series, 398.

States to suppress unlawful disorder and violence, to protect life and property, to restore peace, and to insure protection of law to the people of the State of Nevada."

Subsequently, the Secretary of State wired the Governor that Federal troops had been sent according to his request and added:

"The calls upon the President on your part for the interposition of troops do not at present satisfy the requirements of the Constitution and the laws so as to justify orders that the military force shall take any affirmative action. If such action should be desired under the Constitution and section 5297 of the Revised Statutes to suppress an insurrection a call must be made by the legislature of the State unless circumstances are such that the legislature can not be convened, and no statement or intimation has been made that the legislature of Nevada can not be convened. Action under section 5299 of the Revised Statutes is to be taken not upon the call of the Governor of a State, but upon the judgment of the President of the United States that some portion or class of the people of a State are denied the equal protection of the laws to which they are entitled under the Constitution of the United States. Action under this section requires the production of evidence of specific facts sufficient to sustain a judgment by the President that the condition described in the statute exists, and a mere statement of domestic disturbance would not seem to be sufficient.

"The facts thus far stated in the telegraphic communications from the Governor of Nevada, high and unimpeachable as the source is, do not seem sufficient to sustain a judgment that the condition described in section 5299 exists.

"I respectfully suggest that if in your judgment such interposition is needed you furnish further evidence of facts justifying action by the President, or cause the legislature of Nevada to be convened and to make the necessary call in accordance with the Constitution and section 5297 of the Revised Statutes."

The following day the President notified the Governor that he had sent troops ten days before and that no insurrection had occurred, and seemingly, no circumstances existed to justify his being called on to furnish the troops

under the provision of the Constitution; that he had sent the troops to be ready to meet any grave emergency which seemed likely at once to arise, but did not feel at liberty to leave them indefinitely under such circumstances that they would be performing on the part of the United States those ordinary duties of maintaining public order in the State which rest upon the State government. "As the legislature of Nevada has not been convened, I am bound to assume that the powers already vested in the peace officers of the State are adequate, and that if they should choose to do so they can maintain order themselves. Under these circumstances, unless there be forthwith further cause shown to justify keeping the troops in Nevada, I shall direct that they return to their former station."

Later the Governor replied to the President and said among other things: "A state of domestic violence and insurrection arises in my judgment, when armed bodies are in existence with sufficient power to overcome the civil authorities, and continual threats were made of the destruction of life and property. This condition has existed in this State in the mining districts the past year and exists there now. It calls for the presence of the troops to keep the peace. In my judgment it is necessary that troops be kept at Goldfield an indefinite period of time."

To this the President replied: "Your telegram in effect declares that you have failed to call the legislature together because, in your judgment, the legislature would not call upon the government of the United States for the use of troops. The Constitution of the United States imposes, not upon you, but upon the legislature, if it can be convened, the duty of calling upon the government of the United States to protect the State of Nevada against domestic violence. You now request me to use the armed forces of the United States in violation of the Constitution because in your judgment the legislature would fail to perform its duty under the Constitution. The State government does not appear to have made any serious effort to do its duty by the effective enforcement of its police functions. I repeat what I have already said to you several times, that under the circumstances now existing in your State, as made known to me, an application from the legislature of the State is an essential condition to the in-

definite continuance of the troops there. The first need is that the State authorities should do their duty, and the first step toward this is the assembling of the legislature. If within the term of five days, notice has not been issued by you calling the legislature together the troops will be immediately returned to their former station."

Shortly after the receipt of this telegram the Governor issued a call for a meeting of the General Assembly of that State. He then asked that the troops remain for a specified time until the legislature could be convened and act. To this the President sent to the Governor the following reply.

"My telegram to you of the 14th inst. by the Secretary of State sets out what must be shown as a matter of actual fact to exist in order to warrant the President in acting on the request of the State authorities. The action must be either to suppress an insurrection which the State authorities are unable to suppress, or to secure to some portion or class of the people of the State the equal protection of the laws to which they are entitled under the Constitution of the United States, and which is denied them. Action under this or any other section requires the production of evidence sufficient to sustain a judgment by the President that the condition described in the statute exists. A mere statement of domestic disturbance, still less a mere statement of apprehension of domestic disturbance, is not sufficient, even though it comes from as high and unimpeachable a source as the governor of a State."

After the convening of the legislature of the State the following resolution was passed:

"Resolved, by the Senate of the State of Nevada, the Assembly concurring, that

"Whereas, conditions exist in the State of Nevada that border upon and threaten an immediate state of domestic violence, and,

"Whereas, said State of Nevada has no State militia or other adequate police force at its disposal sufficient to protect its inhabitants against domestic violence, therefore be it

"Resolved, that application is hereby made by the legislature of Nevada to the President of the United States to retain in the Goldfield mining district of Nevada a suffi-

cient force of the United States Army to protect said State against domestic violence and to insure to the inhabitants of that community and the State domestic tranquillity and preservation of law and order and the observance of the laws of the United States and the State of Nevada, and that such portion of the United States Army be maintained in said district until the State of Nevada through its legislature now in extraordinary session assembled, shall be able to provide by law for the organization and equipment of a State constabulary or other police force sufficient to maintain law and order and suppress any domestic violence that may occur."

To this the President replied: "I authorize you to inform the legislature that in accordance with its request I will permit the troops to remain in Nevada for such reasonable length of time as will give opportunity to the legislature to organize such police force as will enable the State authorities to perform the police functions of the State, assuming, of course, that there will be all possible expedition in the matter."⁸⁰

The peculiar facts developed by this correspondence were:

First, that the State of Nevada had no militia which it could call upon to repel domestic violence.

Second, that the Governor of the State was convinced that such a condition prevailed that in the absence of a State militia the civil authorities were entirely helpless to enforce the law and to preserve peace.

Third, as the General Assembly had recently refused to pass a law for the establishment of a State constabulary and as the members of that legislature were still in office the Governor did not believe that if he should call the legislature together it would take any different action from what it had previously done or call upon the President for assistance. Under such circumstances the Governor did not think it necessary to call the General Assembly together, but himself demanded assistance from the President. At first the President in response to the Governor's request sent troops. Subsequently he felt that the necessary steps had not been taken by the State authorities

⁸⁰ Document, No. 607, 60th Congress, 1st Session.

to justify him in sending the troops, and he accordingly notified the Governor to that effect. The correspondence shows that the Governor acted upon the positive suggestion, if not direction, of the President, and convened the general assembly.

The conclusions from this case are instructive. First, the President of the United States must be satisfied that the necessary preliminary steps have been taken by the State where the violence has occurred before he is justified in exercising his authority under the Constitution. Second, when the legislature can be convened he is not justified in acting until that has been done, and the legislature has made the proper demand upon him under the Constitution. If the legislature cannot be convened, then the President would respond to the demand of the executive of the State but in no other case. The precedent established by this case must be of great practical value in such contingencies in the future.

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two-thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

The doctrine that a constitution can be amended is of comparatively recent origin in the growth of constitutional government. Experience, however, taught that governments change and that their constitutions must also change to meet the requirements of new conditions and new policies. When the early charters were granted to the American Colonists they were sometimes changed by

the sovereign and it was understood that such power resided in the King, although to maintain the ancient rule each charter declared that its form of government should be perpetual.³¹

The first provision for the amendment of a charter is found in the Pennsylvania Frame of April 2, 1683. That instrument contained a provision that it might be amended by the consent of the "Governor and six parts of seven of the freemen in provincial Council and General Assembly." The Pennsylvania Frame of 1696 contained a similar provision.

The Pennsylvania Charter of Privileges of 1701 provided that, "The First Article of this Charter relating to Liberty of Conscience, and every Part and Clause therein, according to the true Intent and Meaning thereof, shall be kept and remain, without any Alteration, inviolably for ever."

In this respect the Constitution of the United States resembles this ancient instrument, for after providing for amendments it says, "No State shall without its consent, be deprived of its equal suffrage in the Senate."

The other colonial charters did not contain provisions for amendments. Franklin's Articles of Confederation of 1775 provided, "As all new institutions may have imperfections which only time and experience can discover, it is agreed that the general congress, from time to time, shall propose such amendments of this constitution as may be found necessary, which, being approved by a majority of the colony assemblies, shall be equally binding with the rest of the Articles of this Confederation." The Constitutions of Maryland, Delaware and Pennsylvania, for 1776, and those of Georgia and Vermont, for 1777, contained provisions relative to amendments, but not by the legislatures. Jameson says, "With few exceptions the State Constitutions first framed contained no provision for their future Amendment."³²

But by the year 1787 eight State Constitutions embodied such provisions. Three, Maryland, Delaware and South Carolina, conferred the power to amend on the legislatures under certain restrictions. The other five

³¹ Fisher's Evolution of the Constitution, 174.

³² Ames on Amendments, 14.

States, Pennsylvania, Vermont, Georgia, Massachusetts and New Hampshire, conferred the power upon conventions which should be called for the purpose. The Federal Constitution was the first instrument perhaps in the world to provide for amendments to a constitution by submitting the amendments which should be proposed, for ratification to a legislative assembly or a convention called expressly for that purpose.

There was but little to guide the Convention upon the subject of amendments and it has been said, "The idea that provision should be made in the instrument of government itself for the method of its amendment is peculiarly American."³³

The first clause of this section is attributable to Mr. Madison, that part which relates to an amendment, prior to 1808, to Mr. Rutledge and the last clause to Gouverneur Morris.

The Articles of Confederation provided, "No alteration should at any time be made in any of the Articles, unless such alteration be agreed to in a Congress of the United States and be afterwards confirmed by the legislatures of every State."³⁴ But this method was not considered desirable for amending the Constitution. Notwithstanding the weakness of the Articles and their evident insufficiency no amendment was made to them. This was doubtless due to a belief that it would be impossible to secure the two requisites, the agreement in Congress to the alteration, and the confirmation of such alteration by the legislature of *every State* of the Union. A different method was determined upon for amending the Constitution, and we will trace that method through the debates of the Convention.

In the plan of Mr. Randolph for a Constitution there was a resolution that, "Provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto."³⁵

In the plan submitted by Mr. Pinckney there was the provision, "If two-thirds of the legislatures of the States apply for the same, the Legislature of the United States

³³ Ames on Amendments, 1—note 2.

³⁴ Art. XIII, Articles of Confederation.

³⁵ Journal, 63.

shall call a convention for the purpose of amending the Constitution; or, should Congress, with the consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.”³⁶

When the matter first came up in the Convention it received very slight consideration and was postponed, but at that time Mr. Gerry remarked: “The novelty and difficulty of the experiment requires political division. The prospect of such division also gives intermediate stability to the Government.” Later the matter was taken up, when “several members did not see the necessity of the Resolution, nor the propriety of making the consent of the National Legislature unnecessary.”

Col. Mason urged the necessity of the provision. “Amendments,” he said, “will be necessary; and it will be better to provide for them in any easy, regular and constitutional way, than to trust to chance and violence. It would be improper to require the consent of the National Legislature, because they may abuse their power, and refuse their assent on that very account.”

Mr. Randolph concurred in these views. That part of the resolution which read, “Without requiring the consent of the National Legislature,” was then postponed, while the other provision of the resolution was passed without objection.³⁷

The Committee of the Whole reported to the Convention, “Provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.”³⁸ This was adopted without objection,³⁹ and referred by the Convention to the Committee of Detail.⁴⁰ The Committee changed the Article on amendments and reported it to the Convention in the following form: “On the application of the Legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a convention for that pur-

³⁶ Journal, 72.

³⁷ Journal, 149.

³⁸ Journal, 162.

³⁹ Journal, 409.

⁴⁰ Journal, 448.

pose,"⁴¹ and in this form it was passed by the Convention by unanimous vote and without debate.⁴²

On the 10th of September following, Mr. Gerry in the Convention moved to reconsider the Article as it had been adopted by the Convention, and in support of his motion said: "This Constitution is to be paramount to the State Constitutions. It follows, from this Article, that two-thirds of the States may obtain a Convention, a majority of which can bind the Union to innovations that may subvert the State Constitutions altogether," and asked if this was a situation proper to be run into.

Mr. Hamilton seconded the motion; but, he said, with a different view from Mr. Gerry. He did not object to the consequences stated by Mr. Gerry. There was no greater evil in subjecting the people of the United States to the major voice, than the people of a particular State. It had been wished by many, and was much to have been desired, that an easier mode of introducing amendments had been provided by the Articles of the Confederation. It was equally desirable now, that an easy mode should be established for supplying defects which would probably appear in the new system. The mode proposed was not adequate. The State Legislatures will not apply for alterations; but with a view to increase their own powers. The National Legislature will be the first to perceive, and will be most sensible to, the necessity of amendments; and ought also to be empowered, whenever two-thirds of each branch shall concur, to call a Convention.⁴³

The motion of Mr. Gerry to reconsider was carried by a vote of nine to one.

Mr. Sherman moved to add to the Article the following: "Or the legislature may propose amendments to the several States for their approbation; but no amendments shall be binding until consented to by the several States."

Mr. Wilson moved to insert "two-thirds of" before the words "several States;" but this was lost by a vote of five to six. Mr. Wilson then moved to insert "three-fourths of" before the words "the several States," which was agreed to.

⁴¹ Journal, 461.

⁴² Journal, 640.

⁴³ Journal, 692.

Mr. Madison then moved to postpone consideration of the amended proposition in order to take up the following: "The Legislature of the United States, whenever two-thirds of both Houses shall deem necessary, or on the application of two-thirds of the Legislatures of the several States, shall propose amendments to this Constitution, which shall be valid to all intents and purposes as part thereof, when the same shall have been ratified by three-fourths, at least, of the Legislatures of the several States, or by conventions in three-fourths thereof, as one or the other mode of ratification may be proposed by the Legislature of the United States,"⁴⁴ This motion was seconded by Mr. Hamilton.

At this point Mr. Rutledge said that he could never agree to give a power by which the Articles relating to slaves might be altered by the States not interested in that property, and prejudiced against it. In order to obviate this objection, the following words were added to the proposition: "Provided that no amendments, which may be made prior to the year eighteen hundred and eight, shall in any manner affect the fourth and fifth sections of the seventh Article." This amendment was agreed to, and the proposition of Mr. Madison was then carried by a vote of nine States to one, Delaware voting no, and New Hampshire being divided.⁴⁵ Mr. Rutledge's amendment referred to slavery, and had no practical effect after 1808, when the importation of slaves was to cease.

The Committee on Style reported the Article as proposed by Mr. Madison with the amendment as proposed by Mr. Rutledge.⁴⁶ When this report was made to the Convention there was objection to it.

Mr. Sherman expressed fears that three-fourths of the States might be brought to do things fatal to particular States; as abolishing them altogether, or depriving them of their equality in the Senate. He thought it reasonable that the proviso in favor of the States importing slaves should be extended, so as to provide that no State should be affected in its internal police, or deprived of its equality in the Senate.

⁴⁴ Journal, 693.

⁴⁵ Journal, 694.

⁴⁶ Journal, 712.

Col. Mason thought the plan of amending the Constitution exceptionable and dangerous. As the proposing of amendments is in both the modes to depend, in the first immediately, and in the second ultimately, on Congress, no amendments of the proper kind would ever be obtained by the people, if the Government should become oppressive.

Mr. Gouverneur Morris and Mr. Gerry moved to amend the Article so as to require a convention on application of two-thirds of the States, and this was adopted.

Mr. Sherman moved to annex to the Article the proviso: "That no State shall, without its consent, be affected in its internal police, or be deprived of its equal suffrage in the Senate." This motion was lost.⁴⁷

That no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

Gouverneur Morris was the author of this clause. On Saturday before the adjournment of the Convention, which was on Monday September 17, he moved to amend the motion before that body by adding the above words as a proviso. This proviso, says Mr. Madison in his Journal of the Convention, "being dictated by the circulating murmurs of the States was agreed to without debate, no one opposing it, or on the question saying no," and the article as thus amended became a part of the Constitution.⁴⁸

Mr. Madison referring to this clause says: "It was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the Legislature; and was probably insisted on by the States particularly attached to that equality."⁴⁹

Mr. Tucker says: "This provision, which fixed irrevocably the equipollency of each State in the Senate, unless such State surrenders it by its separate consent, is clear evidence that no change in this respect can be made but by a new compact, to which each State, as a distinct factor, must be a party. It proves the continuing and perpetual

⁴⁷ Journal, 737.

⁴⁸ Journal, 739.

⁴⁹ The Federalist, No. 43.

independence of the State as a primordial political particle, in order to its own protection against the *vox majoritatis*, whether of population or of States. It proves more. If the State was not to be preserved as an equal in sovereignty, despite a difference in population, there is no assignable reason for thus shielding its equality in the Senate against all action but at its own will and at its own consent. This equality of sovereignty in the Senate of each State is the only unchangeable principle in the whole Constitution. A State in its essential equality can never be destroyed but by its own separate will. This clause as to amendments, therefore, shows that while members and States in the two Houses of Congress propose amendments, the States through their separate legislatures or conventions must ratify the proposed amendments and each State must ratify an amendment taking away its equipollency in the Senate.⁵⁰

The clause was intended to protect each State in its power in the Senate. Nothing was to occur which should in any way deprive a State of any of its legislative authority except by its own consent. Why the clause was inserted in this article rather than in some more appropriate place does not appear. It does not seem to be logically and consistently arranged, yet it was adopted and inserted where we find it by a unanimous vote of the Convention.

In the North Carolina Convention Mr. Iredell said this clause was adopted to prevent any consolidation taking place, without the consent of the States.⁵¹

⁵⁰ Tucker on the Constitution, vol. 1, 323.

⁵¹ In the North Carolina Convention which ratified the Constitution, Mr. Iredell, when this clause was under consideration made the following remarks concerning it.

"This is a very important clause. In every other constitution of government that I have ever heard or read of, no provision is made for necessary amendments. The misfortune attending most constitutions which have been deliberately formed, has been, that those who formed them thought their wisdom equal to all possible contingencies, and that there could be no error in what they did. The gentlemen who framed this Constitution thought with much more diffidence of their capacities; and, undoubtedly, without a provision for amendment it would have been more justly liable to objection, and the characters of its framers would have appeared much less meritorious. This, indeed, is one of the greatest beauties of the system, and should strongly recommend it to every candid mind. The constitution of any government which can-

In this article two methods are proposed, by which the Constitution may be amended. In the first, Congress is required to propose an amendment whenever two-thirds of both branches thereof shall deem it necessary. In the second, Congress is required to call a convention which may propose an amendment when the legislatures of two-thirds

not be regularly amended when its defects are experienced, reduces the people to this dilemma—they must either submit to its oppressions, or bring about amendments, more or less, by a civil war.

“Happy this, the country we live in! The Constitution before us, if it be adopted, can be altered with as much regularity, and as little confusion, as any act of Assembly; not, indeed, quite so easily, which would be extremely impolitic; but it is a most happy circumstance, that there is a remedy in the system itself for its own fallibility, so that alterations can without difficulty be made, agreeable to the general sense of the people. Let us attend to the manner in which amendments may be made. The proposition for amendments may arise from Congress itself, when two-thirds of both houses shall deem it necessary. If they should not, and yet amendments be generally wished for by the people, two-thirds of the legislatures of the different States may require a general convention for the purpose, in which case Congress are under the necessity of convening one. Any amendments which either Congress shall propose, or which shall be proposed by such general convention, are afterwards to be submitted to the legislatures of the different States, or conventions called for that purpose, as Congress shall think proper, and, upon the ratification of three-fourths of the States, will become a part of the Constitution. By referring this business to the legislatures, expense would be saved; and in general, it may be presumed, they would speak the genuine sense of the people. It may, however, on some occasions, be better to consult an immediate delegation for that special purpose. This is therefore left discretionary. It is highly probable that amendments agreed to in either of these methods would be conducive to the public welfare, when so large a majority of the States consented to them. And in one of these modes, amendments that are now wished for may, in a short time, be made to this Constitution by the States adopting it.” 4 Elliot, 176, 177.

It would be difficult to find support for the whole of this expression. That part which says, “The Constitution, if it be adopted, can be altered with as much regularity, and as little confusion, as any act of Assembly,” will not be readily assented to. Say what we will of our method of amending our Constitution, it is a ponderous piece of constitutional machinery. Perhaps it is the best we can get, but it is nevertheless difficult to set in motion and to regulate. Mr. Woodrow Wilson, in writing on this subject has said:

“It is at once curious and instructive to note how we have been forced into practically amending the Constitution without constitutionally amending it. The legal processes of constitutional change are so slow and cumbersome that we have been constrained to adopt a serviceable framework of fictions which enables us easily to preserve the

of the States apply for such convention. After an amendment has been proposed, either by Congress or by a convention, it must be ratified by the legislatures of three-fourths of the States, or by conventions in three-fourths of the States, according to the mode of ratification proposed by Congress. When an amendment has been ratified in either of these ways it becomes part of the Constitution as completely and effectually as though it was one of the original articles of that instrument.

All the amendments which have been made to the Constitution have been proposed by Congress upon the request of two-thirds of each branch thereof, and have been ratified by the legislatures of three-fourths of the States. The requisite number of States have never applied to Congress to call a convention for the purpose of proposing amendments to the Constitution. Whether it was considered as impracticable or for other reasons was regarded as an undesirable method to pursue, in all the history of the Government it has not been resorted to.

Whether an amendment is proposed by Congress, or by a convention, it is ratified or rejected by the representatives of the people either in the legislatures or in conventions and not by the people voting on it directly. The people, have no direct power either to propose an amendment to the Constitution, or to ratify it after it is proposed and submitted.

The Constitution does not prescribe the time in which

forms without laboriously obeying the spirit of the Constitution, which will stretch as the nation grows. It would seem that no impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of formal amendments erected in Article Five. That must be a tremendous movement of opinion which can sway two-thirds of each House of Congress and the people of three-fourths of the States." Wilson's Congressional Government, 242, 243.

An eminent English constitutional writer has said: "The sovereign of the United States has been aroused to action but once during the course of ninety years. It needed the thunders of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again arouse him to activity. But a monarch who slumbers for years is like a monarch who does not exist. A federal constitution is capable of change, but for all that, a federal constitution is apt to be unchangeable." Dicey, *Law of the Constitution* (4th ed.), 140.

the States may ratify an amendment. Such a provision might have been regarded as an attempt to force the States into a ratification, whereas it was the desire of the Convention that the action of the States should be deliberate and free from influence. New Hampshire was the ninth State to ratify the Constitution, which it did on the 21st of June, 1788, nine months after its submission to the States. Rhode Island was the last State to ratify, which it did on May 29, 1790, two years and eight months after the submission of the Constitution. Virginia was the eleventh State to ratify the first ten amendments, thus securing the necessary three-fourths of the States. This was one year and eight months after the amendments had been proposed. The Eleventh Amendment was not ratified by the necessary number of States until three years and eight months after it was submitted. This was the longest time any amendment was pending before its ratification.

The subject does not appear to have been considered by the Constitutional Convention nor by either of the State Conventions called to consider the ratification of the Constitution. When the Fourteenth Amendment was pending in the Senate, Senator Buckalew tried to secure the insertion of a provision "that the amendment should be passed upon by the legislature of each State at its first session next after its submission, and that no acceptance or rejection should be reconsidered or again brought in question at any subsequent session, nor shall any acceptance of the amendment be valid if made after three years from the passage of this resolution,"⁵² but this was rejected by the Senate. It is therefore an unsettled question how long a time the States have in which to ratify an amendment.

A constitutional amendment is now pending. Thirty-five States must ratify it before it can become a part of the Constitution. Suppose thirty-four States should ratify it within a reasonable time but the thirty-fifth should not do so until the expiration of ten or fifteen years? Would this be a ratification within the meaning of the Constitution? Can the doctrine of reasonable time be applied in such a case? Who but the State can judge of

⁵² Cong. Globc, pt. 3, 1 Seas., 39 Cong. 2271.

what would be a reasonable time? It is for the State to ratify and cannot the State take its own time to do it? What branch of the government can tell a State when it must ratify an amendment in the absence of any constitutional provision of the subject? The question may some day become of great importance.

Benefit of power to amend.—The power of amendment is one of the most important conferred by the Constitution. It can readily be understood how unfortunate it would have been if the Constitution contained no provision of this character. A Constitution which is to be the organic and basic law of the people while the nation endures, could hardly be so framed as to meet all the necessities of government, and the changing conditions of human affairs. The growth of the nation, the new conditions of life, and the changes in governmental policy, which must of necessity occur in the experience of a great people, would make it necessary to enlarge the provisions of their organic law. Such experiences could not be avoided. Constitutions can only be changed by consent or force. Unless there be some method in the instrument itself by which the Constitution can be enlarged when the necessity arises it must meet the fate of revolution. People will not endure for any great period what they believe to be a defective Constitution or a weak form of government. They will demand changes which will satisfy the new situation, and unless they secure these changes in a lawful manner they will attempt to secure them by force and revolution. It was, therefore, a wise provision to have the Constitution define with precision how it may be amended. In this way it contains the elements of self-preservation. Considering this subject Mr. Madison said:

“That useful alterations will be suggested by experience could not but be foreseen. It was requisite, therefore, that a mode for introducing them should be provided. The mode preferred by the Convention seems to be stamped with every mark of propriety. It guards equally against that extreme facility which would render the Constitution too mutable; and that extreme difficulty which might perpetuate its discovered faults. It, moreover, equally enables the General, and the State Governments, to originate the amendment of errors, as they may be pointed out, by

the experience on one side or on the other. The exception in favor of the equality of suffrage in the Senate was probably meant as a palladium to the residuary sovereignty of the States, implied and secured by that principle of representation in one branch of the legislature; and was probably insisted on by the States particularly attached to that equality. The other exception must have been admitted on the same considerations, which produced the privilege defended by it."⁵³

Can a legislature rescind its ratification of an amendment?—A question of much interest is, when the legislature of a State has ratified an amendment, can the act of ratification be rescinded? The General Assembly of Ohio ratified the 14th amendment on January 11, 1867. The next legislature, on January 15, 1868, passed this joint resolution:

"Whereas, no amendment to the Constitution of the United States is valid until duly ratified by three-fourths of all the States composing the United States, and until such ratification is completed, any State has a right to withdraw her assent to any proposed amendment.

"Resolved, by the General Assembly of the State of Ohio, That the above recited resolution be, and the same is, hereby rescinded, and the ratification on behalf of the State of Ohio of the above recited proposed amendment to the Constitution of the United States is hereby withdrawn and refused."

The legislature of New Jersey ratified the same amendment September 11, 1866, and on March 27, 1868, a later legislature rescinded the ratification, saying: "The proposed amendment not having yet received the assent of three-fourths of the States, which is necessary to make it valid, the natural and constitutional right of this State to withdraw its assent is undeniable."

The legislature of New York, on April 14, 1869, ratified the 15th amendment to the Constitution, and the next legislature, in 1870, revoked the ratification as follows: "*Whereas the proposed 15th amendment has not been ratified by the legislatures of three-fourths of the several States, and has not become a part of the Constitution of the*

⁵³ The Federalist, No. 43.

United States; *Therefore be it resolved*, That the above recited concurrent resolution be, and it hereby is, repealed, rescinded and annulled."

It may be fairly regarded that these legislative enactments conceded that if three-fourths of the States ratified a proposed amendment it would then be beyond the power of any State legislature to rescind its action of ratification. This narrows the question for consideration to whether a State can rescind its ratification before three-fourths of the legislatures have ratified an amendment. In 1818 Congress passed an act requiring the Secretary of State, on receiving official notice from the States that an amendment had been adopted by the requisite number of States, to cause the amendment to be published with his certificate that it had been duly ratified. When the Secretary, Mr. Seward, announced the ratification of the 14th amendment, he said:

"Whereas, no law expressly or by conclusive implication authorizes the Secretary of State to determine and decide doubtful questions as to the authenticity of the organization of State legislatures, or as to the power of any State legislature to recall a previous act or resolution of ratification of any amendment proposed to the Constitution, and

"Whereas, it appears from official documents on file in this Department that the amendment to the Constitution of the United States, proposed as aforesaid, has been ratified by the legislatures of the following States: and

"Whereas, it further appears from documents on file in this Department that the legislatures of two of the States first above enumerated, to wit, Ohio and New Jersey, have since passed resolutions respectively withdrawing the consent of each of said States to the aforesaid amendment; and whereas it is deemed a matter of doubt and uncertainty whether such resolutions are not irregular, invalid, and therefore ineffectual for withdrawing the consent of the said two States, or either of them to the aforesaid amendments.

"Now, therefore be it known that I, William H. Seward, Secretary of State of the United States, by virtue and in pursuance of the second section of the act of Congress, approved April 20, 1818, hereinbefore cited, do hereby certify that if the resolutions of the legislatures of Ohio and New Jersey ratifying the aforesaid amendment are to be deemed

as remaining of full force and effect, notwithstanding the subsequent resolutions of the legislatures of those States which purport to withdraw the consent of said States from such ratification, then the aforesaid amendment has been ratified in the manner hereinbefore mentioned, and so has become valid, to all intents and purposes, as a part of the Constitution of the United States."⁵⁴

This proclamation was issued on July 20, 1868. On the following day, Congress passed a concurrent resolution that "the following States, including Ohio and New Jersey, having ratified the 14th article of amendment to the Constitution of the United States; Therefore be it resolved, That said 14th article is hereby declared to be a part of the Constitution of the United States, and it shall be duly promulgated as such by the Secretary of State."⁵⁵

In pursuance of this resolution Secretary Seward issued another proclamation ordering the amendment to be published in the newspapers, in which he certified, "That the said amendment has become valid to all intents and purposes as a part of the Constitution of the United States."

This resolution is an expression or declaration by Congress that a State has no power to rescind its ratification of an amendment to the Constitution.

Though amendments to the Constitution are not of frequent occurrence, the question under consideration may become of great practical importance, and merits a full investigation and discussion.

When the adoption of the Constitution was pending before the Convention in New York there was great apprehension that the Convention would adopt it conditionally. Hamilton wrote⁵⁶ to Mr. Madison on the subject as follows:

"July 8, 1788.

"My dear Sir:

"I felicitate you sincerely on the event in Virginia, but my satisfaction will be allayed if I discover too much facility in the business of amendment-making. I fear the system will be wounded in some of its vital parts by too gen-

⁵⁴ 15 Statutes at Large, 707.

⁵⁵ Statutes at Large, 709, 710.

⁵⁶ Works of Hamilton, vol. 1, 463.

eral a concurrence in some very injudicious recommendations. I allude more particularly to the power of taxation. The more I consider *requisition* in any shape, the more I am out of humor with it. We yesterday passed through the Constitution. Today some definite proposition is to be brought forward, but what we are at a loss to judge. We have good reason to believe that our opponents are not agreed and this affords some ground of hope. Different things are thought of—*conditions precedent*, or previous amendments; *conditions subsequent*, or the proposition of amendments, upon condition that if they are not adopted within a limited time, the State shall be at liberty to *withdraw* from the Union; and lastly, *recommendatory amendments*. In either case, *constructive declarations* will be carried as far as possible.

“Yours affectionately,

“A. Hamilton.”

Again he wrote to the same correspondent⁵⁷ a few days later:

“Poughkeepsie, Saturday, July, 1788.

“I thank you, my dear sir, for yours by post. Yesterday I communicated to Duer our situation, which I presume he will have communicated to you. It remains exactly the same. No further question having been taken, I fear the footing I mentioned to Duer is the best upon which it can be placed; but everything possible will yet be attempted to bring the party from that stand to an unqualified ratification. Let me know your idea upon the possibility of our being received on that plan. You will understand that the only qualification will be the *reservation* of a right to recede, in case our amendments have not been decided upon in one of the modes pointed out by the Constitution within a certain number of years, perhaps five or seven. If this can in the first instance be admitted as a ratification, I do not fear any further consequences. Congress will, I presume, recommend certain amendments to render the *structure* of the Government more secure. This will satisfy the more considerate and honest opposers of the Constitution, and with the aid of them will break up the party.

“Yours affectionately,

“A. Hamilton.”

⁵⁷ Works of Hamilton, vol. 1, 464, 465.

To this letter Madison⁵⁸ replied:

“New York, Sunday evening.

“My dear Sir:

“Yours, of yesterday, is this instant come to hand, and I have but a few minutes to answer it. I am sorry that your situation obliges you to listen to propositions of the nature you describe. My opinion is, that a reservation of a right to withdraw, if amendments be not decided on under the form of the Constitution within a certain time, is a *conditional* ratification; that it does not make New York a member of the Union, and consequently that she could not be received on that plan. Compacts must be reciprocal—this principle would not in such a case be preserved. The Constitution requires an adoption *in toto* and *forever*. It has been so adopted by the other States. An adoption for a limited time would be as defective as an adoption of some of the articles only. In short, any *condition* whatever must vitiate the ratification. What the new Congress, by virtue of the power to admit new States, may be *able* and disposed to do so in such case, I do not inquire, as I suppose that is not the material point at present. I have not a moment to add more than my fervent wishes for your success and happiness. The idea of reserving a right to withdraw was started at Richmond, and considered as a conditional ratification which was itself abandoned as worse than a rejection.

“Yours,

“James Madison, Jr.”

Madison's expression that the Constitution requires an adoption *in toto* and *forever* shows his opinion was that affirmative action having once been exercised by the legislature, it must stand for all time and could not be affected by any subsequent legislation. The principle is similar to cases where the right to vote to authorize the issuance of bonds is conferred by statute and where there is nothing in the act limiting the number of times the vote may be taken. In such cases it has been held that a negative vote does not prevent the submission of the question again, even though several votes have been taken with a negative

⁵⁸ Works of Hamilton, vol. 1, 465.

result.⁵⁹ In the United States district court it was held: "One election does not exhaust the power, unless the result is in favor of affirmative action."⁶⁰

In *Fletcher v. Peck*,⁶¹ Marshall, C. J., said:

"The principle is asserted, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature. The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power."

The underlying principle seems to be that where the result of a vote is negative, it is the same as though no action had been taken. If it is affirmative, it exhausts the power under the right to vote and is final. Thus where a vote has once been taken with an affirmative result, the power under the act is exhausted and the result cannot be rescinded by a subsequent vote, but until affirmative action is taken the power to have another vote is not exhausted. In the cases of the amendments in question, affirmative action was taken in each instance, and therefore the power to vote on the amendment was exhausted, and subsequent legislatures had no power to rescind the former acts.

The approval of the President is not necessary to the validity of an amendment.—When Congress proposed the first ten amendments it did not submit them to the President for his signature. The question whether the signature of the President is necessary to an amendment arose over the adoption of the 11th amendment, and went to the Supreme Court where it was held in *Hollingsworth et al. v. Virginia*,⁶² that the amendment was constitutionally adopted though it was not presented to the President for his approval. When the 12th amendment was being considered by the Senate the question again came up, notwithstanding the decision of the Supreme Court, but, by a vote of twenty-three to seven, it was

⁵⁹ 29 Conn., 174.

⁶⁰ *Woodward v. Board of Supervisors, etc.*, 2 Central Law Journal, 396.

⁶¹ 6 Cranch, 87.

⁶² 3 Dall. 378, 381.

decided not to submit it to the President for his signature.⁶³ The question does not seem to have come before the Senate again until 1861, when an amendment was submitted to and approved by President Buchanan.⁶⁴

The 13th amendment was proposed in January, 1865, and submitted to the President. On the 4th of February, following, Senator Trumbull introduced a resolution in the Senate declaring that "the article of amendment, proposed by Congress, to be added to the Constitution respecting slavery, having been inadvertently presented to the President for his approval, it is declared that such approval was unnecessary and should not constitute a precedent for the future, etc."

The Senate considered the resolution. All the provisions of the Constitution bearing upon the question were quoted and commented upon, but there does not seem to have been entire unanimity of opinion among the Senators. Mr. Howe, a Senator from Iowa, thought an amendment should be presented to the President for his signature. Referring to the vote on the subject in the Senate in 1803, he said he noticed among the names of Senators who voted to present the amendment to the President those of John Quincy Adams and Mr. Pickering, and thought, with all deference to the opinion of Justice Chase, in *Hollingsworth v. Virginia*, that when such gentlemen affirmed that a step is necessary, some argument may fairly be offered to show that it is not necessary.

Senator Johnson thought if the question was an original one, it would be very improper to say it was free from doubt, but thought it fairly settled that an amendment need not be presented to the President. On a vote being taken the resolution of rescission was agreed to. Thus a second time the Senate put itself on record as saying that an amendment to the Constitution need not be approved by the President.

The 14th amendment proposed by Congress in 1866 was not submitted to the President for his approval. The failure of Congress to submit the amendment to the President caused him to send this message to that body calling their attention to the omission:

⁶³ Dec. 12, 1803, Senate Journal, 323.

⁶⁴ Senate Journal, Second Session, 36th Congress, 397.

"Even in ordinary times any question of amending the Constitution must be justly regarded as of permanent importance. This importance is at the present time enhanced by the fact that the joint resolution was not submitted by the two Houses for the approval of the President."⁶⁵

⁶⁵ Message of President Johnson, June 22, 1866, 391, 392.

The following is the President's message in full on the subject:

"To the Senate and House of Representatives:

"I submit to Congress a report of the Secretary of State, to whom was referred the concurrent resolution of the 18th instant, respecting a submission to the legislatures of the States of an additional article to the Constitution of the United States. It will be seen from this report that the Secretary of State had, on the 16th instant, transmitted to the governors of the several States certified copies of the joint resolution passed on the 13th instant, proposing an amendment to the Constitution.

"Even in ordinary times any question of amending the Constitution must be justly regarded as of paramount importance. This importance is at the present time enhanced by the fact that the joint resolution was not submitted by the two Houses for the approval of the President, and that, of the thirty-six States which constitute the Union, eleven are excluded from representation in either House of Congress, although, with the single exception of Texas, they have been entirely restored to all their functions as States, in conformity with the organic law of the land, and have appeared at the National Capital by Senators and Representatives who have applied for and have been refused admission to the vacant seats. Nor have the sovereign people of the nation been afforded an opportunity of expressing their views upon the important question which the amendment involves. Grave doubts, therefore, may naturally and justly arise as to whether the action of Congress is in harmony with the sentiments of the people, and whether State legislatures, elected without reference to such an issue, should be called upon by Congress to decide respecting the ratification of the proposed amendment.

"Waiving the question as to the constitutional validity of the proceedings of Congress upon the joint resolution proposing the amendment, or as to the merits of the article which it submits, through the executive department, to the legislatures of the States, I deem it proper to observe that the steps taken by the Secretary of State, as detailed in the accompanying report, are to be considered as purely ministerial, and in no sense whatever committing the Executive to an approval or a recommendation of the amendment to the State legislatures or to the people. On the contrary, a proper appreciation of the letter and spirit of the Constitution, as well as of the interests of national order, harmony, and union, and a due deference for an enlightened public judgment, may at this time well suggest a doubt whether any amendment to the Constitution ought to be proposed by Congress, and pressed upon the legislatures of the several States for final decision.

The last amendment ratified—the 15th—was not submitted to the President for his signature. It is somewhat singular that there should have existed in the legislative branch of the Government a disposition to raise the question after the decision of the Supreme Court in *Hollingsworth et al. v. Virginia*. That decision clearly settled the question and the vote in the Senate in 1803 and again in 1865, not to send the amendment to the President was an affirmance by the Senate of that decision. So this action by the Senate, together with the fact that neither of the last two amendments was submitted to the President, and the 13th only by an act declared to be an inadvertence, may fairly be regarded as finally settling the question that submission is not necessary.⁶⁶

until after the admission of such loyal Senators and Representatives of the now unrepresented States as have been or as may hereafter be chosen in conformity with the Constitution and laws of the United States.

“Andrew Johnson.

“Washington, D. C., June 22, 1866.”

⁶⁶ As to the way in which the Constitution should be amended Mr. Madison expressed his preference in a letter to Mr. George Eve, on January 2, 1789:

“I have intimated that the amendments ought to be proposed by the Congress. I prefer this mode to that of a General Convention—1st. Because it is the most expeditious mode. A convention must be delayed until two-thirds of the State legislatures shall have applied for one, and afterwards the amendments must be submitted to the States. 2ndly. Because it is the most certain mode. There are not a few States who will absolutely reject the proposal of a Convention, and yet not be averse to amendments in the other mode. Lastly. It is the safest mode. The Congress, who will be appointed to execute as well as to amend the Government, will probably be careful not to destroy or endanger it. A Convention, on the other hand, meeting in the present ferment of parties, and containing, perhaps, insidious characters from different parts of America, would at least spread a general alarm, and be but too likely to turn everything into confusion and uncertainty. It is to be observed, however, that the question concerning a General Convention will not belong to the federal Legislature. If two-thirds of the States apply for one, Congress cannot refuse to call it; if not, the other mode of amendments must be pursued.”
Writings of Madison, vol. 1, 448.

CHAPTER XLIX.

PRIOR DEBTS AND ENGAGEMENTS—SUPREME LAW OF THE LAND— OATH OF OFFICERS—RELIGIOUS TEST—RATIFICATION.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This clause was proposed by Governor Randolph. It was suggested by the 12th article of the Articles of Confederation which read as follows:

“All bills of credit emitted, moneys borrowed, and debts contracted by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the United States and the public faith are hereby solemnly pledged.”

The Committee of the Whole recommended to the Convention as its 15th resolution, “that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day, after the reform of the Articles of Union shall be adopted, and for the completion of all other engagements.” This was substantially taken from a resolution found in Mr. Randolph’s plan for a constitution. When the resolution came up in the Convention, Mr. Gouverneur Morris suggested it might be well to omit the assumption of the engagements, and also that Congress ought not to be continued until all the States should adopt the reform. After a short debate on the question the resolution was lost.

Later in the Convention Mr. Rutledge moved that a Grand Committee be appointed to consider the necessity and expediency of the United States assuming all the State debts,¹ and suggested in support of his resolution that the

¹ Journal, 551.

assumption by the General Government in favor of the State debts would be just, first, because such debts were contracted in the common defense, and second, because, as the taxes on imports, which were the only sure source of revenue, were to be given by the States to the General Government, it would be necessary for the Government to assume the debts of the States. He said it would be politic to do so, as only such conduct on the part of the General Government would conciliate the people to the Constitution.

Mr. Rutledge's motion for the appointment of such a committee was carried by a vote of 6 to 4.²

Mr. Livingston reported for this committee on August 21 as follows:

"The Legislature of the United States shall have power to fulfill the engagements which have been entered into by Congress, and to discharge, as well the debts of the United States, as the debts incurred by the several States, during the late war, for the common defense and general welfare."³

During the discussion on this report Mr. Gouverneur Morris moved as a substitute: "The Legislature shall discharge the debts, and fulfill the engagements of the United States," and this was unanimously agreed to.

Mr. Mason objected to the term, "fulfill the engagements and discharge the debts," as too strong an expression, and made a short argument in support of his position. Mr. Randolph moved as a substitute for the pending provision the following: "All debts contracted, and engagements entered into, by or under the authority of Congress, shall be as valid against the United States under this Constitution as under the Confederation." This motion was carried by a vote of ten to one, Pennsylvania being the only State voting against it.⁴ In this form the resolution went to the Committee on Style, and was there changed by omitting the words, "by or under the authority of Congress," and inserting in their stead, "before the adoption of this Con-

² The committee consisted of Messrs. Langdon, King, Sherman, Livingston, Clymer, Dickinson, McHenry, Mason, Williamson, C. C. Pinckney, and Baldwin. *Journal*, 553.

³ *Journal*, 568, 569.

⁴ *Journal*, 607.

stitution." As thus modified by the Committee on Style it was inserted in the Constitution.

Commenting on this clause, Mr. Madison said:

"This can only be considered as a declaratory proposition; and may have been inserted, among other reasons for the satisfaction of the foreign creditors of the United States, who cannot be strangers to the pretended doctrine that a change in the political form of civil society has the magical dissolving of its moral obligations.

"Among the lesser criticisms which have been exercised on the Constitution, it has been remarked that the validity of engagements ought to have been inserted in favor of the United States as well as against them; and in the spirit which was characterized by little critics, the omission has been transformed and magnified into a plot against the national rights. The authors of this discovery may be told what few others need to be informed of, that, as engagements are in their nature reciprocal, an assertion of their validity on one side necessarily involves a validity on the other side; and that, as the article is merely declaratory, the establishment of the principle in one case is sufficient for every case. They may be further told, that every constitution must limit its precautions, to dangers that are not altogether imaginary; and that no real danger can exist that the Government would *dare*, with, or even without this constitutional declaration before it, to remit the debts justly due to the public, on the pretext here condemned."⁵

The insertion of this clause in the Constitution showed the good faith and conscientious purpose of the framers of that instrument. It was not a resolution of some convention, or of some State Assembly, or even of Congress, but it was the deliberate judgment of the Convention which framed the Federal Constitution, that the national debts contracted, and engagements entered into, prior to the adoption of the Constitution, should be as valid against the United States as they were under the Confederation. It is one of the most notable declarations in the whole Constitution. An effort was made by those who were indebted to the British Government to show that the

⁵ The Federalist, No. 43.

Revolution had dissolved all contracts, and released all such debtors from their obligations, but the adoption of this clause determined otherwise.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties, made or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of Any State to the Contrary notwithstanding.

It is probable that Mr. Rutledge was the author of this clause, though it has been attributed to Luther Martin.⁶ Anticipating that a clause of this character would be inserted in the Constitution, Mr. Pinckney in his plan had this provision:

“All acts made by the Legislature of the United States, pursuant to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land; and all judges shall be bound to consider them as such in their decisions.”⁷

A stronger provision is found in the following, taken from the plan submitted by Mr. Paterson:

“All acts of the United States in Congress, made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation, vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, so far forth as those acts or treaties shall relate to the said States or their citizens; and that the Judiciary of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding; and that if any State, or any body of men in any State, shall oppose or prevent the carrying into execution such acts or treaties, the Federal Executive shall be authorized to call forth the power of the Confederated States, or so much thereof as may be nec-

⁶ Landon's Constitutional History of the United States, 97

⁷ Journal, 69.

essary, to enforce and compel an obedience to such acts, or an observance of such treaties.”⁸

On the 17th of July, Mr. Luther Martin moved:

“That the Legislative acts of the United States made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their citizens and inhabitants; and that the Judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding.”⁹

This resolution was unanimously agreed to, and was referred to the Committee of Detail.¹⁰ That committee referred the subject back to the Convention in the following form:

“The acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several States, and of their citizens and inhabitants; and the Judges in the several States shall be bound thereby in their decisions, anything in the Constitution or laws of the several States to the contrary notwithstanding.”¹¹

In the Convention Mr. Rutledge moved to amend this resolution to read:

“This Constitution, and the laws of the United States made in pursuance thereof, and all the treaties made under the authority of the United States, shall be the supreme law of the several States, and of their citizens and inhabitants; and the Judges of the several States shall be bound thereby in their decisions, anything in the Constitution or laws of the several States to the contrary notwithstanding.”¹²

This amendment which enlarged the provision so as to include the Constitution, was accepted without opposition.

Later, on motion of Mr. Madison, seconded by Mr.

⁸ Journal, 166.

⁹ Journal, 364.

¹⁰ Journal, 445.

¹¹ Journal, 455.

¹² Journal, 593.

Gouverneur Morris, the amendment was reconsidered and the words "or which shall be made" were inserted after the words "all treaties made." Mr. Madison, writing on this subject, said:

"The indiscreet zeal of the adversaries to the Constitution has betrayed them into an attack on this part of it also, without which it would have been evidently and radically defective. To be fully sensible of this, we need only suppose for a moment that the supremacy of the State Constitutions had been left complete by a saving clause in their favor.

"In the first place, as these constitutions invest the State Legislatures with absolute sovereignty, in all cases not excepted by the existing Articles of Confederation, all the authorities contained in the proposed Constitution, so far as they exceed those enumerated in the Confederation, would have been annulled, and the new Congress would have been reduced to the same impotent condition with their predecessors.

"In the next place, as the constitutions of some of the States do not even expressly and fully recognize the existing powers of the Confederacy, an express saving of the supremacy of the former, would in such States, have brought into question every power contained in the proposed Constitution.

"In the third place, as the Constitutions of the States differ much from each other, it might happen that a treaty or national law, of great and equal importance to the States, would interfere with some and not with other Constitutions, and would consequently be valid in some of the States, at the same time that it would have no effect in others.

"In fine, the world would have seen, for the first time, a system of government founded on an inversion of the fundamental principles of all government; it would have seen the authority of the whole society everywhere subordinate to the authority of the parts; it would have seen a monster, in which the head was under the direction of the members."¹²

This clause makes the supreme law of the land to con-

¹² The Federalist, No. 44.

sist, first, of the Constitution; second, of the laws which shall be made in pursuance of the Constitution; third, of all treaties made, under the authority of the United States.

There has been some question why this clause was inserted in the Constitution. It is probable that the supremacy of the Constitution and the laws made in pursuance thereof and treaties made under the authority of the United States, would have possessed the same efficacy without this clause. A Constitution is always the supreme law of the land for which it is made. Laws themselves are supreme, for they are the rules which control and guide the conduct of the citizens or inhabitants of the land. It is only those laws which are passed in pursuance of the Constitution which are supreme. If they fail when judged by this test they do not become the supreme law of the land.

Relative to treaties there was doubtless a special reason why they were included in this clause, and made by it part of the supreme law of the land. Prior to the adoption of the Constitution the treaty stipulations which were entered into were shamefully disregarded by the individual States. To such an extent was this indulged in that Congress, earnestly protested against it by a letter addressed to the respective States.¹⁴

¹⁴ The letter was in part as follows:

April 13, 1787.

"Sir: Our secretary for foreign affairs has transmitted to you copies of a letter to him, from our minister at the court of London, of the 4th day of March, 1786, and of the papers mentioned to have been enclosed with it.

"We have deliberately and dispassionately examined and considered the several facts and matters urged by Britain, as infractions of the treaty of peace on the part of America, and we regret that in some of the States too little attention appears to have been paid to the public faith pledged by that treaty.

"Not only the obvious dictates of religion, morality and national honor, but also the first principles of good policy, demand a candid and punctual compliance with engagements constitutionally and fairly made.

"Our national constitution having committed to us the management of the national concerns with foreign States and powers, it is our duty to take care that all the rights which they ought to enjoy within our jurisdiction by the laws of nations and the faith of treaties, remain inviolate. And it is also our duty to provide that the essential interests and peace of the whole confederacy, be not impaired or en-

The purpose of the framers of the Constitution in making treaties a part of the supreme law of the land and pledging the national faith to their maintenance and binding the judiciary of the States to their observance was, that under the new government the provisions of our treaties should be faithfully carried out; and it cannot be questioned that inserting this clause in the Constitution greatly emphasized its importance, for it is a positive declaration by the Constitution, that the Constitution, the laws made in pursuance thereof and all treaties made under the authority of the United States shall be the supreme law of the land. The Constitution being the supreme law of the land no act of Congress can be binding or valid which is not authorized by it.¹⁵

Commenting upon this clause Mr. Hamilton observed: "It is said that the laws of the Union are to be the *supreme law* of the land. What inference can be drawn from this, or what would they amount to, if they were not to be supreme? It is evident they would amount to nothing. A law, by the very meaning of the term, includes supremacy. It is a rule which those to whom it is pre-

dangered by deviations from the line of public faith, into which any of its members may from whatever cause be unadvisedly drawn.

"Be pleased, sir, to lay this letter before the legislature of your State, without delay. We flatter ourselves they will concur with us in opinion, that candour and justice are as necessary to true policy as they are to sound morality, and that the most honorable way of delivering ourselves from the embarrassment of mistakes, is fairly to correct them. It certainly is time that all doubts respecting the public faith be removed, and that all questions and differences between us and Great Britain be amicably and finally settled. The States are informed of the reasons why his Britannic Majesty still continues to occupy the frontier posts, which by the treaty he agreed to evacuate, and we have the strongest assurances that an exact compliance with the treaty on our part, shall be followed by a punctual performance of it on the part of Great Britain.

"It is important that the several legislatures should, as soon as possible, take these matters into consideration and we request the favor of you to transmit to us an authenticated copy of such acts and proceedings of the legislature of your State, as may take place on the subject and in pursuance of this letter.

"By order of Congress,

"ARTHUR ST. CLAIR, *President.*"

¹² Journal of Congress, 32, 36.

¹⁵ United States v. Germaine, 99 U. S. 510.

scribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers intrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for political power and supremacy. But it will not follow from this doctrine, that acts of the larger society, which are not pursuant to its constitutional powers, but which are invasions of the residuary authorities of the smaller societies, will become the supreme law of the land. These will be merely acts of usurpation, and will deserve to be treated as such. Hence we perceive, that the clause which declares the supremacy of the laws of the Union, like the one we have just before considered, only declares a truth, which flows immediately and necessarily from the institution of a Federal Government. It will not, I presume, have escaped observation, that it expressly confines this supremacy to laws made pursuant to the Constitution; which I mention merely as an instance of caution in the Convention; since that limitation would have been to be understood, though it had not been expressed."¹⁶

This clause met with much opposition when the Constitution was submitted to the States for ratification. In the North Carolina Convention it was asserted that it would sweep off all the Constitutions of the States; that it was a total repeal of every act and Constitution of the States and that as the judges are sworn to uphold it, it will produce an abolition of the State governments, and will be destructive of every law which will come in competition with the laws of the United States.¹⁷

It would be useless to enter upon any lengthy discussion of this provision. No clause of the Constitution is more frequently referred to and favorably commented upon

¹⁶ The Federalist, No. 33. .

¹⁷ 4 Elliot, 179, 180.

by Courts and writers on constitutional law. It establishes the supremacy of the Constitution, as well as the supremacy of all laws passed in pursuance thereof, which means all laws which are constitutional, and also the supremacy of all treaties which are made under the authority of the United States.¹⁹

Judge Story says: "The propriety of this clause would seem to result from the very nature of the Constitution. If it was to establish a national government, that government ought, to the extent of its powers and rights, to be supreme. It would be a perfect solecism to affirm that a national government should exist with certain powers, and yet that in the exercise of those powers it should not be supreme. What other inference could have been drawn than of their supremacy if the Constitution had been totally silent? And surely a positive affirmance of that which is necessarily implied cannot, in a case of such vital importance, be deemed unimportant. The very circumstance that a question might be made, would irresistibly lead to the conclusion that it ought not to be left to inference. It will be observed that the supremacy of the laws is attached to those only which are made in pursuance of the Constitution,—a caution very proper in itself; but in fact the limitation would have arisen by irresistible implication if it had not been expressed.

"In regard to treaties, there is equal reason why they should be held, when made, to be the supreme law of the land. It is to be considered that treaties constitute solemn compacts of binding obligation among nations: and unless they are scrupulously obeyed and enforced, no foreign nation would consent to negotiate with us; or if it did, any want of strict fidelity on our part in the discharge of the treaty stipulations would be visited by reprisals or war. It is, therefore, indispensable that they should have the obligation and force of a law, that they may be executed by the judicial power, and be obeyed like other laws."²⁰

¹⁹ *Ex parte Siebold*, 100 U. S. 371, 399; *Tennessee v. Davis*, 100 U. S., 257, 263; *Northern Securities Co. v. United States*, 193 U. S. 197, 344; *McCray v. United States*, 195 U. S. 27, 60; *Gulf, Colorado & S. F. Ry. v. Heefly*, 158 U. S. 98, 104.

²⁰ Story on the Constitution, vol. 2, secs. 1837, 1838.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

The Articles of Confederation did not require officers of the States to support them. So far as requiring judicial officers to support the Constitution the language of this section was anticipated by Mr. Madison in his letter of April 16, 1787, to Washington, in which he said, "It seems at least necessary that the oaths of the Judges should include a fidelity to the general as well as local Constitution."²¹

The plan which Mr. Randolph submitted for a Constitution provided that the legislative, executive and judiciary powers within the several States ought to be bound by oath to support the Articles of Union.²² When this provision first came before the Committee of the Whole its consideration was postponed. Later, it was again considered, when Mr. Sherman opposed it as unnecessary and as intruding into the State jurisdictions.

Mr. Gerry also did not like the clause, and thought there was as much reason for requiring an oath of fidelity to the States from national officers, as *vice versa*.

Mr. Luther Martin moved to strike out the words, "within the several States," observing that if the new oath should be contrary to that already taken by State officers it would be improper; if coincident, the oaths already taken would be sufficient. But the motion was lost.

The resolution as proposed by Mr. Randolph then passed by a vote of six to five.²³ The Committee of the Whole reported the resolution to the Convention substantially as it was adopted.²⁴

In the Convention, when the resolution came up for

²¹ Madison's Writings, vol. 1, 289; Thorpe's Constitutional History, vol. 1, 312, note.

²² Journal, 63.

²³ Journal, 149, 150.

²⁴ Journal, 162.

consideration, Mr. Williamson suggested that a reciprocal oath should be required from national officers, to support the governments of the States.

Mr. Gerry moved to insert, as an amendment, that the oath of the officers of the national Government also should extend to the support of the national Government, which was agreed to without debate.²⁵

Mr. Wilson said he was never fond of oaths, considering them as a left-handed security only. A good government did not need them, and a bad one could or ought not to be supported.^{25a}

The resolution as reported was agreed to without objection. It was then reported by the Committee of Detail as follows: "The members of the legislatures, and the executive and judicial officers of the United States, and of the several States, shall be bound by oath to support this Constitution."²⁶ When this was being considered in the Convention the words "or affirmation" were added after the word "oath."²⁷

This provision is a very general one. It includes the officers of the executive, legislative and judicial branches of the General Government and of each State government. All are required by this section to take an oath or affirmation to support "this Constitution,"—that is, the Constitution of the United States. It was eminently proper that this clause should be inserted in the Constitution. Every officer should take an oath to support the national Constitution, because he owes an ob-

²⁵ Journal, 409, 410.

^{25a} Mr. Gouverneur Morris seems to have agreed with Mr. Wilson on the subject of oaths, especially when taken by members of legislative bodies. In a letter to Mr. Pickering, he said, "the legislative lion will not be entangled in the meshes of a logical net. The legislature will always make the power, which it wishes to exercise, unless it be so organized, as to contain within itself the sufficient check. Attempts to restrain it from outrage, by other means, will only render it more outrageous. The idea of binding legislators by oaths is puerile. Having sworn to exercise the powers granted, according to their true intent and meaning, they will when they feel a desire to go farther, avoid the shame if not the guilt of perjury, by swearing the true intent and meaning to be, according to their comprehension, that which suits their purpose." Sparks' Life of Gouverneur Morris, vol. 3, 323.

²⁶ Journal, 461.

²⁷ Journal, 640.

ligation of the most binding kind to his government. The suggestion of Mr. Gerry in the Convention that there was as much reason for requiring an oath of fidelity from national officers to the States, as from the State officers to the General Government, did not meet with favor in the Convention, and it certainly was not based upon sound principle. For the reason above stated, every officer of the State government should take an oath to support the national Constitution, but it does not follow that every national officer should take an oath to support the constitution of every State, because such an officer does not owe any special allegiance to every State in the Union.

The Constitution does not prescribe the form of the oath nor does it confer the power to do so upon any branch of the Government. It has, however, always been exercised by the legislative branch of the Government.

The oath of office may be administered by the President of the Senate, or by the presiding officer of that body for the time being, to each Senator, previous to his taking his seat.²⁸ The oath may be administered to the President of the Senate by any member of that body.

The Speaker of the House of Representatives administers the oath to the members and delegates thereof, and to the clerk before entering on any other business. Any member of the House may administer the oath to the Speaker. As a matter of practice the oath is generally administered by the member who has served the longest in the House.

History of the oath under this clause.—The first act passed by Congress, which was on June 1, 1789, prescribed the following form of oath or affirmation required by this clause: "I, A... B..., do solemnly swear or affirm that I will support the Constitution of the United States."²⁹

²⁸ The following is the oath which members of Congress are required to take:

"I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States, against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." R. S. Sec. 1757, Jefferson's Manual, 393.

²⁹ 1 U. S. Statutes at Large, 23.

This continued to be the form of the oath until July 2, 1862, when, on account of the war between the States, Congress passed an act which provided:

"Every person elected or appointed to any office of honor or profit, either in the civil, military or naval service, except the President and the persons embraced by the section following, shall before entering upon the duties of such office, and before being entitled to any part of the salary or other emoluments thereof, take and subscribe the following oath:

" 'I, A... B..., do solemnly swear or affirm that I have never voluntarily borne arms against the United States since I have been a citizen thereof; that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever, under any authority, or pretended authority, in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear or affirm that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic, that I will bear true faith and allegiance to the same, that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God.' " ³⁰

This is the oath so often referred to as the "ironclad oath." The act of Congress which prescribed this oath was declared unconstitutional by the Supreme Court so far as it related to attorneys at law. ³¹

On July 11, 1868, Congress passed the following act:

"Whenever any person who has participated in the late rebellion, and from whom all legal disabilities arising therefrom have been removed by act of Congress by a vote of two-thirds of each house, has been or shall be elected or appointed to any office or place of trust in or under

³⁰ R. S., Sec. 1756, U. S. Statutes at Large, vol. 12, 502.

³¹ Ex parte Garland, 4 Wallace, 333.

the government of the United States, he shall, before entering upon the duties thereof, instead of the oath prescribed by the act of July two, Eighteen hundred and sixty-two, take and subscribe the following oath or affirmation:

“I, A... B..., do solemnly swear or affirm that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter, So help me God.”³²

On February 15, 1871, Congress passed another act by which it was provided: “When any person, who is not rendered ineligible to office by the provisions of the Fourteenth Amendment to the Constitution, shall be elected or appointed to any office of honor or trust under the government of the United States, and shall not be able on account of his participation in the late rebellion to take the oath prescribed in the act of Congress approved July second, Eighteen hundred and sixty-two, said person shall, in lieu of said oath, before entering upon the duties of said office, take and subscribe the oath prescribed in an act of Congress entitled, ‘An act prescribing an oath of office to be taken by persons from whom legal disabilities shall have been removed.’”³³

On the 13th of May, 1884, still another act was passed by Congress which provided: “Hereafter the oath to be taken by any person elected or appointed to any office of honor or profit either in the civil, military or naval service except the President of the United States, shall be as prescribed in section 1757 of the Revised Statutes.”³⁴

It will be observed that there is a broad difference between the form of this oath and the one prescribed by the act of June 1, 1789. That oath only required the person taking it to support the Constitution of the United States, whereas the present oath requires the person who takes it to support and defend the Constitution of the

³² 15 U. S. Statutes at Large, 85.

³³ 16 U. S. Statutes at Large, 412, 413. R. S., Sec. 1757.

³⁴ 23 Statutes at Large, 22 1 Supp. R. S., 428.

United States, against all enemies, foreign and domestic, that he will bear true faith and allegiance to the same; that he takes the oath freely, without any mental reservation or purpose of evasion; and that he will well and faithfully discharge the duties of the office on which he is about to enter and to the truth and performance of all this the oath invokes the help of Almighty God. An invocation which was omitted in the original form of the oath. None of the oaths requires the person taking it to defend, obey or observe the laws of the United States. This would seem to be a singular omission.

The provision as to taking the oath is mandatory upon all officers included in it.—In *Thomas, Sheriff, v. Taylor*, the question of the force and obligation of this clause came before the Supreme Court of Mississippi and it was held that the provision that Senators, Representatives in Congress and other officers shall be bound by oath or affirmation to support the Constitution is mandatory and compliance with it is necessary. "We cannot think," said Peyton, J., "that so important a provision in the paramount law of the land was intended to be merely directory, and not absolutely necessary to be complied with."

Commenting upon the provision, the court (p. 697) said: "The sad experience of the inefficiency of the old Confederation, which was a mere league of States, without any cohesive power or energy, forced the people of the States to surrender the league then existing and to establish a national Constitution of government, which has been the subject of different interpretations according to political complexion of parties, with reference to the extent of the powers of the Federal and State governments; yet it is a historical fact, that although many declarations of rights, many propositions, and many protestations of reserved powers are to be found accompanying the ratifications of the Constitution in the various State conventions, sufficiently evincive of the extreme caution and jealousy of those bodies and of the people at large, there is nowhere to be found the slightest allusion to the instrument as a compact of States in their sovereign capacity and no reservation of any right, on the part of any State, to dissolve its connection or to abrogate its assent, or to suspend the operations of the Constitution as to itself."³⁵

³⁵ 42 Miss. 651, 700.

But no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Mr. Pinckney^{35a} was the author of this famous provision. In the Convention he moved it as an amendment to the foregoing clause and it was agreed to without objection. In his speech in support of his amendment he said: "It is a provision the world will expect from you in the establishment of a system founded on republican principles, and in an age so liberal and enlightened as the present."³⁶

The Amendment was prompted by a desire to keep Church and State forever separate and distinct in the United States.

It has received the universal approval of the American people, as it received the unanimous approval of the Convention. No effort has been made to change or abolish it. On the contrary, an amendment to the Constitution was proposed as late as 1876 which excluded ministers of any denomination from holding any office under the government of the United States, and also prohibited the requirement of any religious test as a qualification for office under the United States or any State in the United States.³⁷

^{35a} The authorities are not agreed which of the Pinckneys was the author of this provision. Some attribute it to Charles Pinckney, while others say that Charles Cotesworth Pinckney was the author.

³⁶ Journal, 640. Moore's American Eloquence, vol. 1, 369.

On this subject Hamilton's language was, "Nor shall any religious sect, or denomination, or religious test for any office or place, be ever established by law." Hamilton's Works, vol. 2, 406.

³⁷ Belief in the existence of a Supreme Being and the Christian religion was an essential part of the oath taken by members of some of the State legislatures under their State Constitutions before the adoption of the Federal Constitution.

Members of the House of Representatives of Pennsylvania under the Constitution of 1776, subscribed to the following in addition to taking the oath of allegiance: "I, _____, do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked; and I do acknowledge the Scriptures of the Old and New Testament to be given by divine inspiration." Poore's Charters, vol. 2, 1543.

The members of the General Assembly of Delaware under the Constitution of 1776 subscribed to the following declaration, besides an oath: "I, _____, do profess faith in God the Father, and in Jesus

Commenting upon this provision, Chief Justice Marshall, in *M'Culloch v. Maryland*,²⁰ said:

"The powers vested in Congress may certainly be carried into execution, without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established; taxes may be imposed and collected; armies and navies may be raised and maintained; and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the Convention was not unmindful of this subject. The oath which might be exacted—that of fidelity to the Constitution—is prescribed, and no other can be required. Yet, he would be charged with insanity who should contend, that the Legislature might not super-add to the oath directed by the Constitution such other oath of office as its wisdom might suggest."

Chief Justice Taney, in *Ableman v. Booth*,²¹ observed:

"Nor is there anything in the supremacy of the General Government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of State sovereignty. Neither this Government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State, is proved by the clause which requires that the members of the State Legislatures, and all executive and judicial officers of the several States (as well as those of the General Government), shall be bound, by oath or affirmation, to support this Constitution.

Christ His only Son, and in the Holy Ghost, one God, blessed for evermore, and I do acknowledge the Holy Scriptures of the Old and New Testament to be given by divine inspiration." *Poore's Charters*, vol. 1, 276.

²⁰ 4 Wheaton, 316, 416.

²¹ 21 Howard, 506, 524.

"This is the last and closing clause of the Constitution, and inserted when the whole frame of Government, with the powers hereinbefore specified, had been adopted by the Convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several States for their consideration and decision."

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

In the orderly arrangement of the articles of the Constitution it was proper that the manner of controlling the ratification of that instrument should be the last article in it. It was provided in the Articles of Confederation that no alteration should be made in any of the articles, unless it were agreed to in a Congress of the United States and afterwards confirmed by the legislature of every State.⁴⁰ This required that two things must be done: First, the alteration must be agreed to in Congress, and, second, it must be confirmed by the vote of every State. Any one State under this provision had the power to defeat any change, however desirable and important, and though all the other States favored it.

It was felt in the Convention that if such unanimity was required to ratify the Constitution it might never be ratified. The first outline of a method of ratification of the Constitution was in the following resolution found in Mr. Randolph's plan for a Constitution:

"Amendments which shall be offered to the Confederation, by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon."⁴¹

This resolution apparently contemplated that certain amendments would be offered to the Articles of Confederation, and suggested that the amendments should be submitted to assemblies of representatives which should be

⁴⁰ Articles of Confederation, Article 13.

⁴¹ Journal, 63.

recommended by the legislatures, and which should be chosen by the people to decide thereon. The plan did not favor the submission of the proposed amendments of the Articles to the people directly for their approval or rejection, but to assemblies or conventions chosen by the people. It was debated in the Convention for a short time, when it was postponed for future consideration.

Mr. Ellsworth moved in the Convention that the Constitution be referred to the legislatures of the States for ratification. This provoked a lengthy debate.

Mr. Mason opposed the motion upon several grounds. The legislatures, he said, have no power to ratify the Constitution. They are the mere creatures of the State Constitutions, and cannot be greater than their creators. If the legislatures could ratify the Constitution, succeeding legislatures, having equal authority, could undo the acts of their predecessors; this would leave the National Government standing on the weak and tottering foundation of an act of assembly.

Mr. Gerry opposed the plan of referring the Constitution to the legislatures and assigned five distinct reasons for his opinion, but doubted the wisdom of waiting for the unanimous concurrence of the States.

Mr. Williamson preferred a reference to conventions as more likely to be composed of able men than the legislatures.

Mr. King preferred a reference to the authority of the people expressly delegated to conventions, as the most certain means of obviating all disputes and doubts concerning the legitimacy of the new Constitution, as well as the most likely means of drawing forth the best men in the States to decide on it. At the conclusion of the debate Mr. Ellsworth's motion to refer the Constitution to the legislatures of the States was defeated by a vote of three to seven.

Mr. Gouverneur Morris then moved that the reference be made to one general convention chosen and authorized by the people, to consider, amend and establish the same, but this motion did not meet with a second. It was again moved on June 12, to refer the Constitution for ratification to assemblies chosen by the people, and this was car-

ried by a vote of nine to one, Delaware alone voting no.⁴² As it went to the Committee of Detail, the resolution read:

"That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly, or assemblies of representatives recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon."

As it was reported by the committee back to the Convention, it read: "The ratification of the conventions of — States shall be sufficient for organizing this Constitution." It is not known who suggested the resolution which the committee reported.

Mr. King moved to add the words, "between the States," and this was carried. In the Convention various numbers were suggested for filling the blank, but finally, nine was inserted.⁴³ In this amended form the resolution was sent to the Committee on Style, which changed it to its present form. The objections urged against this article when the ratification of the Constitution was being considered by the States were fully answered, and the merits of the article ably maintained by Mr. Madison in the *Federalist*, where he said:

"This article speaks for itself. The express authority of the people alone could give due validity to the Constitution. To have required the unanimous ratification of the thirteen States, would have subjected the essential interests of the whole, to the caprice or corruption of a single member. It would have marked a want of foresight in the Convention, which our own experience would have rendered inexcusable.

"Two questions of a very delicate nature present themselves on this occasion: 1. On what principle the Confederation, which stands in the solemn form of a compact among the States, can be superseded without the unanimous consent of the parties to it? 2. What relation is to subsist between the nine or more States ratifying the Constitution, and the remaining few who do not become parties to it?

"The first question is answered at once, by recurring

⁴² Journal, 410-417.

⁴³ Journal, 644.

to the absolute necessity of the case; to the great principle of self-preservation; to the transcendent law of nature, and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim, and to which all such institutions must be sacrificed. *Perhaps*, also, an answer may be found without searching beyond the principles of the compact itself. It has been heretofore noted among the defects of the Confederation, that in many of the States it had received no higher sanction than a mere legislative ratification. The principle of reciprocity seems to require that its obligation on the other States should be reduced to the same standard. A compact between independent sovereigns, founded on acts of legislative authority, can pretend to no higher validity than a league or treaty between the parties. It is an established doctrine on the subject of treaties, that all the articles are mutually conditions of each other; that a breach of any one article, is a breach of the whole treaty; and that a breach, committed by either of the parties, absolves the others; and authorizes them, if they please, to pronounce the compact violated and void. Should it unhappily be necessary to appeal to these delicate truths, for a justification for dispensing with the consent of particular States to a dissolution of the Federal pact, will not the complaining parties find it a difficult task to answer the *multiplied* and *important* infractions, with which they may be confronted? The time has been, when it was incumbent on us all to veil the ideas which this paragraph exhibits. The scene is now changed, and with it, the part which the same motives dictate.

"The second question is not less delicate; and the flattering prospect of its being merely hypothetical, forbids an over-curious discussion of it. It is one of those cases which must be left to provide for itself. In general, it may be observed, that although no political relation can subsist between the assenting and dissenting States, yet the moral relations will remain uncanceled. The claims of justice, both on one side and on the other, will be in force, and must be fulfilled; the rights of humanity must in all cases be duly and mutually respected; whilst considerations of a common interest, and, above all, the

remembrance of the endearing scenes which are past, and the anticipation of a speedy triumph over the obstacles to reunion, will, it is hoped, not urge in vain, *moderation* on one side, and *prudence* on the other.”⁴⁴

The Convention transmitted the Constitution and a resolution relating to it, to Congress, which received them on September 20, 1787. On the 29th Congress passed the following resolution:

“*Resolved*, that the said report (namely, the Constitution) with the resolutions and the letter accompanying the same, be transmitted to the several legislatures, in order that it be submitted to a convention of delegates chosen in each State by the people thereof in conformity to the resolves of the Convention made and provided in that case.”

Following the passage of this resolution Congress transmitted a copy of the Constitution to each State. Hitherto the public was not familiar with its provisions, the Convention having been held with closed doors, but now it was known to the public and the entire country became aroused over the question of its adoption or rejection. It is not the purpose of this work to follow in detail the history of the struggle to secure the ratification or the defeat, of the Constitution. It is sufficient to say that in those early days of our country's history there were men, as there are men in these days, who were content with the doctrine that “the end justifies the means,” and that in some States the methods by which ratification was secured rivalled the tactics of the modern political magistrate.⁴⁵

The arguments which had been made in the Convention in opposition to the Constitution were repeated with great vehemence in the conventions of the States where the opposition was strongest or the prospects of ratification were

⁴⁴ The Federalist, No. 43.

⁴⁵ In Pennsylvania the friends of the Constitution, being unable to secure a quorum in the convention, captured two of its members who were opposed to the Constitution, and forcibly carried them to the convention hall and held them in their seats, thus constituting a quorum, until the motion to ratify the Constitution could be put and passed. Fiske's Critical Period of American History, 311. Bancroft's History of the Constitution, vol. 2, 240.

most doubtful. If any opponent of the Constitution thought of some new reason why it should be defeated he did not hesitate to urge it with all the ardor of his nature. In New York, Pennsylvania and Virginia, the three large States, the opposition was especially bitter and determined, but the powerful influence of Hamilton in New York, of Wilson in Pennsylvania, and of Madison and Marshall in Virginia, together with the great influence of Washington and Franklin throughout the country, turned the tide of public sentiment in favor of the new system of government. In due time the Constitution was ratified by the requisite number of States, and the new nation took its place among the nations of the earth, destined to become the most powerful factor in civil government in the world.

Delaware was the first State to ratify the Constitution, which it did, unanimously, on December 7, 1787. Pennsylvania did the same five days later by a vote of 46 to 23, just two to one. Six days after Pennsylvania, came New Jersey with a unanimous vote for ratification. On January 2, 1788, Georgia also ratified by unanimous vote. On the 9th of the same month Connecticut ratified by a vote of 128 to 40. Massachusetts, after a bitter contest, passed a resolution of ratification on February 6, 1788, by a vote of 187 to 168; but before a sufficient number of votes could be obtained in favor of ratification in that State it was agreed or understood that a convention for the consideration of amendments should be held. This plan was followed in other States by the friends of the Constitution in order to secure ratification. On April 28, 1788, Maryland ratified by a vote of 63 to 11, South Carolina on May 23 of the same year by a vote of 149 to 73. New Hampshire failed at its first convention to pass a resolution of ratification, but at its second convention ratified by a vote of 57 to 46 on June 21, 1788. This made the ninth State to ratify the Constitution, and the needed number had been secured.

Five days later, June 26, Virginia ratified by a vote of 89 to 79, after a long and bitter contest. New York did not ratify until the 26th of July, 1788, by a vote of 30 to 37, and then not until the friends of the Constitution had promised its opponents that a convention for the con-

sideration of amendments should be held, as had been promised in Massachusetts. North Carolina, like New Hampshire, at its first convention refused to vote for ratification, but at a second convention on November 21, 1789, ratified by a majority of eleven votes. Rhode Island was the only State that did not send delegates to the Constitutional Convention and therefore the only State that took no part in the formation of the Constitution. She was the last to ratify that instrument, which she did on May 29, 1790, by a vote of 34 to 32, the closest vote in any State where there was a division.

The following certificate appears after the Seventh and last Article of the Constitution and is followed by the signatures of the following named delegates representing the various States which participated in the Convention:

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of our Lord one thousand seven hundred and Eighty-seven and of the Independence of the United States of America the Twelfth. In witness whereof We have hereunto subscribed our Names.

Go. Washington,
Presidt. and deputy from Virginia.

New Hampshire.

John Langdon.

Nicholas Gilman

Massachusetts.

Nathaniel Gorham.

Rufus King.

Connecticut.

Wm. Saml. Johnson.

Roger Sherman.

New York.

Alexander Hamilton.

New Jersey.

Wil: Livingston.

David Brearley.

Wm. Paterson.

Jona: Dayton.

Pennsylvania.

B. Franklin.	Thomas Mifflin.
Robt. Morris.	Geo. Clymer.
Thos. Fitzsimons.	Jared Ingersoll.
James Wilson.	Gouv. Morris.

Delaware.

Geo: Read.	Gunning Bedford jun.
John Dickinson.	Richard Bassett.
Jaco: Broom.	

Maryland.

James McHenry.	
Danl. Carroll.	Dan: of St. Thos. Jenifer.

Virginia.⁴⁶

John Blair.	James Madison Jr.
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⁴⁶ It will be observed that Washington, John Blair and James Madison were the only members from Virginia who signed the Constitution, although that State was represented in the Convention by seven members.

Madison in a letter to Jefferson dated New York, Oct. 24, 1787, has left the following account of why the other members from Virginia did not sign the Constitution:

"It will not escape you that three names only from Virginia are subscribed to the act. Mr. Wythe did not return after the death of his lady. Doctor McClurg left the Convention some time before the adjournment. The Governor and Col. Mason refused to be parties to it. Mr. Gerry was the only other member who refused. The objections of the Governor turn principally on the latitude of the general powers, and on the connection established between the President and the Senate. He wished that the plan should be proposed to the States with liberty to them to suggest alterations, which should all be referred to another General Convention, to be incorporated into the plan as far as might be judged expedient. He was not inveterate in his opposition, and grounded his refusal to subscribe pretty much on his willingness to commit himself, so as not to be at liberty to be governed by further lights on the subject.

"Col. Mason left Philadelphia in an exceeding ill humor indeed. A number of little circumstances, arising in part from the impatience which prevailed towards the close of the business, conspired to whet his acrimony. He returned to Virginia with a fixed disposition to prevent the adoption of the plan, if possible. He considers the want of a Bill of Rights as a fatal objection. His other objections are to the

North Carolina.

Wm. Blount.

Hu. Williamson.

Richd. Dobbs Spaight.

substitution of the Senate in place of an Executive Council, and to the powers vested in that body; to the powers of the Judiciary; to the Vice-President being made President of the Senate; to the smallness of the number of Representatives; to the restriction on the States with regard to *ex post facto* laws; and most of all, probably, to the power of regulating trade by a majority only of each House. He has some other lesser objections. Being now under the necessity of justifying his refusal to sign, he will, of course, muster every possible one. His conduct has given great umbrage to the County of Fairfax, and particularly to the Town of Alexandria. He is already instructed to promote in the Assembly the calling a Convention, and will probably be either not deputed to the Convention, or be tied up by express instructions. He did not object in general to the powers vested in the National Government so much as to the modification. In some respects he admitted that some further powers would have improved the system. He acknowledged, in particular, that a negative on the State laws and the appointment of the State Executives ought to be ingredients, but supposed that the public mind would not now bear them, and that experience would hereafter produce these amendments." Madison's Writings, vol. 1, 354, 355.

Ezra Stiles was born in Connecticut in 1727. He graduated from Yale College in 1746 and was President of it from 1778 till his death in 1795. His biographer says, "He was accounted, both at home and abroad as the most accomplished divine of his day in this Country." He kept a daily diary. For December 9, 1787, appears the following entry:

"The Hon. Abm. Baldwin a Delegate from Georgia to Congress, & to the Convention which lately sat at Phila. for the Revision of the federal Constitution, visited & spent the Eveng. with me, and gave me a full Acco. of the Transact. of the Convention. He was formerly a Tutor of Yale College, & is a Patriot, an enlightened, sensible, learned man."

December 21, 1787, has the following entry:

"Mr. Baldwin was one of the Continental Convention at Philada. last Summer. He gave me an Acct. of the whole Progress in Convention. It appeared that they were pretty unanimous in the followg. Ideas, viz. 1. In a firm federal Government. 2. That this shd. be very popular or stand on the People at large. 3. That their Object shd. comprehend all Things of common federal Concern & w^c. individual States could not determine or enforce. 4. That the Jurisdictions & Govt. of each State shd be left intire & preserved as inviolate as possible consistent with the coercive Subordina. for preservg. the Union with Firmness. 5. That the present federal Govt. was inadequate to this End. 6. That a certain Portion or Deg. of Dominion as to *Laws* and *Revenue*, as well as to Treaties with foreign Nations, War & Armies, was necessary. to be ceded by individual States to the Authority. of the

South Carolina.

J. Rutledge.

Charles Pinckney.

Charles Cotesworth Pinckney.

Pierce Butler.

National Council. 7. That the National Council shd consist of two Branches, viz., a Senate & Representatives. That the last shd. be a local Representa. apportioned to the Property & Number of Inhabitants, as far as practicable. That this shd. be the governg. Idea. And yet that the Distinction of States shd. be preserved in the House of Representa. as well as in the Senate. 8. That the Senate stand on the Election & Distinction of States as at present in Congress, and tho' like the Representa. be in some measure proportioned to the No. of Inhab. yet that besides this the Vote in Senate shd. be by States, tho' in the House of Representa. the Vote shd. be by Plurality of Members present indeed but not by States as States. Hereby two Things are secured, one, that the People at large shall be efficaciously represented, the other that the States as separate States, be as also efficaciously represented. 9. That these two Branches combined into one Republican Body be the supreme Legislature & become vested with the Sovereignty of the Confederacy; & have powers of Govt. & Revenue adequate to these Ends. 10. As to a President, it appeared to be the Opin. of Convention, that he shd. be a Character respectable to the Nations as well as by the Federal Empire. To this End that as much Power shd. be given him as could be consistently with guardg. against all possibility of his ascending in a Tract of years or Ages to Despotism & absolute Monarchy:—of which all were cautious. Nor did it appear that any Members in Convention had the least Idea of insidiously layg. the Founda. of a future Monarchy like the European or Asiatic Monarchies either antient or modern. But were unanimously guarded & firm against every Thing of this ultimate Tendency. Accordingly they meant to give considerable Weight as Supreme Executive, but fixt him dependent on the States at large, and at all times impeachable. 10. They vested Congress thus modified with the Power of an adequate Revenue, by Customs on Trade, Excise and direct Taxation by Authority. of Congress; as well as with the Army, Navy, & makg. War & Peace. These were delicate Things, on which all felt solicitous & yet all were unanimously convinced that they were necessary. 11. They were unanimous also in the Expedy. & Necessary. of a supreme judiciary Tribunal of universal Jurisdiction—in Controversies of a legal Nature between States—Revenue—and appellate Causes between subjects of foreign or different States, 12. The Power of appointing Judges and Officers of the supreme Judiciary to be in the Senate.

“These & other general & commandg. Ideas the Members found themselves almost unanimous in. The Representa. would feel for the Interests of their respective local Representations; and the Senate must feel, not for particular local Districts but a Majority of the States or the universal Interest.

“After some Discourses, it was proposed that any & all the Members shd. draught their Ideas. These were all bro't in & examd. & as approved, entered, until all were satisfied they had gone through. Then

Georgia.

William Few.

Abr. Baldwin.

Attest.

William Jackson, Secretary.

they reduced these to one Sheet (written) of Articles or Members of the Constitution. These they considered afresh, sometimes in Committee of the Whole, & sometimes in Convention, with subjoined Alterations & Additions until August; when they adjourned a few Weeks leavg. all to be digested by a Committee of 5 Messrs. Sherman, Elsworth,

"On the Return of Adjourn. the whole Digest was printed and every Member entered his Remarks, Altera. & Corrections. These again were committed to a Committee of one Member of each State of wc. Mr. Baldwin one. This matured the whole. Finally a Committee of 5 viz. Mess. Dr. Johnson, Gouverneur Morris, Wilson, These reduced it to the form in which it was published. Messrs. Morris & Wilson had the chief hand in the last Arrangt. & Composition. This was completed in September. By this Time several Members were absent party. Judge Yates of Albany, Mr. Wyth of Virginia, Judge Sherman & Elsworth. About 42 signed it. Messrs. Mason of Virg. & Gerry of Boston & Gov. Randolph refused. Dr. Franklin sd. he did not entirely approve it, but tho't it a good one, did not know but he shd. hereafter think it the best, on the whole was ready to sign it & wished all would sign it, & that it shd. be adopted by all the States.

"Dr. Franklins Idea that the American Policy, be one Branch only or Representative Senate of one Order, proportioned to Number of Inhab. & Property—often elected—with a President assisted with an executive Council: but this last have nothg. to do in Legislation & Senatorial Government. Teste Mr. Baldwin." Literary Diary of Ezra Stiles, vol. 3, 293, 294, 295.

This is perhaps as fine and comprehensive a summary of what occurred in the Convention which framed the Constitution as can be found any where, and as it bears the *teste* of Mr. Baldwin it is of especial interest. Some statements which it contains concerning the proceedings of the Convention the author has not found in any other document.

President Stiles took great interest in the ratification of the Constitution. His diary contains the following entry as of January 9, 1788:

"At Vh. 30 P. M. The Convention at Hartford accepted & ratified the new federal Constitution; 128 yeas & 39 Nays. Tot. 167+6 absent=173 Tot. Members of Convention. A Currier set off from Hartford at VI, rode 14 Miles in one hour & six minutes and reached the City of N. Haven before XIh. at Night." Stiles' Diary, vol. 3, 300.

CHAPTER L.

HISTORY OF THE FIRST TEN AMENDMENTS.

Since the establishment of the Government but nineteen amendments to the Constitution have been submitted by Congress, and but fifteen have been ratified by the States. Ten of these were proposed by the first Congress, one by the third, and one by the eighth, all in a period of twenty-seven years. This was followed by more than sixty years in which no amendment was ratified. Then as a result of the Civil War three additional amendments, the thirteenth, fourteenth, and fifteenth, were submitted and ratified.

The first ten amendments grew out of the fact that the Constitution did not contain a Bill of Rights. Those who contended for these amendments maintained that in all civil governments the people had certain inherent rights which should be expressed in the Constitution, and that it was the duty of the Government to protect the people in the exercise of such rights. As the Constitution contained no expression of this kind the people insisted on the adoption of certain amendments by which such rights would be secured.¹

¹ Mr. Justice Harlan in his elaborate dissenting opinion in *Maxwell v. Dow*, 176 U. S., 606, 607, said: "When the Constitution was adopted by the Convention of 1787 and placed before the people for their acceptance or rejection, many wise statesmen whose patriotism no one then questioned or now questions, earnestly objected to its acceptance upon the ground that it did not contain a Bill of Rights guarding the fundamental guarantees of life, liberty and property against the unwarranted exercise of power by the National Government. But the friends of the Constitution, believing that the failure to accept it would destroy all hope for permanent union among the people of the original States, and following the advice of Washington, who was the leader of the constitutional forces, met this objection by showing that when the Constitution had been accepted by the requisite number of States and thereby became the supreme law of the land, such amendments could be adopted as would relieve the apprehensions of those who deemed it necessary, by express provisions, to guard against the infringement by the agencies of the General Government of any of the essential rights of American freemen. This view pre-

In the Convention an unsuccessful attempt had been made to incorporate a Bill of Rights in the Constitution. In the debate there Mr. Williamson observed to the House, that no provision was made for juries in civil cases and suggested the necessity of it.

Mr. Gorham said, it was not possible to discriminate equity cases from those in which juries were proper. The representatives of the people might be safely trusted in this matter.

Mr. Gerry urged the necessity of juries to guard against corrupt judges, and proposed that a committee be directed to provide for securing jury trials.

Col. Mason saw the difficulty mentioned by Mr. Gorham and said that jury cases could not be specified, and that a general principle laid down, on this point would

vailed, and the implied pledge thus given was carried out by the first Congress, which promptly adopted and submitted to the people of the several States the first ten amendments. These amendments have ever since been regarded as the National Bill of Rights."

Patrick Henry said in the Virginia Convention:

"The people of England lived without a declaration of rights till the war in the time of Charles I. That King made usurpations upon the rights of the people. Those rights were, in a great measure, before that time undefined. Power and privilege then depended on implication and logical discussion. Though the declaration of rights was obtained from that King, his usurpations cost him his life. The limits between the liberty of the people, and the prerogative of the King, were still not clearly defined.

"The rights of the people continued to be violated till the Stuart family was banished, in the year 1688. The people of England magnanimously defended their rights, banished the tyrant, and prescribed to William, Prince of Orange, by the bill of rights, on what terms he should reign; and this bill of rights put an end to all construction and implication. Before this, sir, the situation of the public liberty of England was dreadful. For upwards of a century, the nation was involved in every kind of calamity, till the bill of rights put an end to all, by defining the rights of the people and limiting the King's prerogative. Give me leave to add (if I can add anything to so splendid an example) the conduct of the American people. They, sir, thought a bill of rights necessary. It is alleged that several States, in the formation of their government, omitted a bill of rights. To this I answer, that they had the substance of a bill of rights contained in their constitutions, which is the same thing. I believe that Connecticut has preserved it, by her Constitution, her royal charter, which clearly defines and secures the great rights of mankind—secures to us the great, important rights of humanity; and I care not in what form it is done." Elliot, vol. 3, 316, 317.

be sufficient. He wished the plan had been prefaced with a Bill of Rights, as it would give great quiet to the people.

Mr. Gerry concurred in this idea and moved for a committee to prepare a Bill of Rights.

Mr. Sherman favored securing the rights of the people where requisite. But the States' declarations of rights would not be repealed by the Constitution and were sufficient.

On the question for a committee to prepare a Bill of Rights the vote stood: New Hampshire, Connecticut, New Jersey, Pennsylvania, Delaware, aye—5. Maryland, Virginia, North Carolina, South Carolina, and Georgia, nay—5. Massachusetts being absent, and the vote being equal the motion was lost. In this way a Bill of Rights was omitted from the Constitution.²

It is very probable that if the Constitution had contained a Bill of Rights none of these amendments would have been suggested, but the opponents of that instrument seized upon this omission and made it the principal ground of attack in their attempt to defeat the ratification of the Constitution.

In answer to why a Bill of Rights was not inserted in the Constitution, no stronger statements have been made than those by Mr. Wilson and Mr. Hamilton, each

² Journal, 717.

A scholarly commentator on the Constitution in referring to the loss of the motion for the establishment of a Bill of Rights, says: "As the South would not consent to a Bill of Rights, the North as is not unusual on such occasions, made a virtue of necessity, and permitted the official record to be made as it stands. But a Bill of Rights was excluded by slavery, and slavery alone.

"This was afterwards distinctly avowed to the South Carolinians by General Charles Cotesworth Pinckney. He said, 'Such bills generally begin with declaring that all men are by nature born free. Now, we should make that declaration with a very bad grace when a large part of our property consists in men who are actually born slaves.' Amid all the sophistry that was wasted to reconcile the people of the North to the omission of a Bill of Rights, and to obliterate the fact that it was through the influence of slavery, here is a plain and honest statement of the exact truth; and it is the only instance where the truth on this subject was boldly and explicitly stated, responsibly vouched, and placed on record, so that to this day it can be seen and produced in evidence." Farrar's Manual of the Constitution, 393, 394.

of whom was a very prominent member of the federal Convention.

When the Constitution was before the convention of Pennsylvania, Mr. Wilson speaking upon the subject of a Bill of Rights, said: "In a government consisting of enumerated powers, such as was then proposed for the United States, a Bill of Rights, which is an enumeration of the powers reserved by the people, must be a perfect or an imperfect statement of the powers and privileges reserved. To undertake a perfect enumeration of the civil rights of mankind, is to undertake a very difficult and hazardous, and perhaps an impossible task; yet if the enumeration is imperfect, all implied power seems to be thrown into the hands of the government, on subjects in reference to which the authority of government is not expressly restrained, and the rights of the people are rendered less secure than they are under the silent operation of the maxim that every power not expressly granted remains in the people. This, he stated, was the view taken by a large majority of the national Convention, in which no direct proposition was ever made, according to his recollection, for the insertion of a Bill of Rights."³

Mr. Hamilton, as well as other prominent friends of the Constitution, took the position that the Constitution itself was a Bill of Rights; that while it did not contain a specific list of such rights such enumeration was not necessary, and that the instrument gave all the rights which it was necessary that the people should have. Discussing this subject in the *Federalist* he said:

"It has been several times truly remarked, that Bills of Rights are, in their origin, stipulations between kings and their subjects, abridgments of prerogatives in favor of privilege, reservations of rights not surrendered to the prince. Such was *Magna Charta*, obtained by the Barons, sword in hand, from King John. Such were the subse-

³ Curtis' History of the Constitution, Vol. 2, 522, 523.

Mr. Wilson's memory was at fault on this point. In the Convention Mr. Gerry moved the appointment of a committee to prepare a Bill of Rights. New Hampshire, Connecticut, New Jersey, Pennsylvania and Delaware voted yea, 5. Maryland, Virginia, North Carolina, South Carolina and Georgia voted nay, 5. The States being equally divided the motion was lost. 5 Elliot, 538.

quent confirmations of that charter by succeeding princes. Such was the *Petition of Right* assented to by Charles the First, in the beginning of his reign. Such, also, was the Declaration of Rights presented by the Lords and Commons to the Prince of Orange in 1688, and afterwards thrown into the form of an act of parliament, called the Bill of Rights. It is evident, therefore, that according to their primitive signification, they have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. Here, in strictness, the people surrender nothing; and as they retain everything, they have no need of particular reservations. '*We the people* of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this Constitution for the United States of America.' This is a better recognition of popular rights, than volumes of those aphorisms, which make the principal figure in several of our State Bills of Rights, and which would sound much better in a treatise of ethics, than in a Constitution of Government. / (

"But a minute detail of particular rights is certainly far less applicable to a Constitution like that under consideration, which is merely intended to regulate the general political interests of the Nation, than to one which has the regulation of every species of personal and private concerns. If therefore the loud clamors against the plan of the Convention, on this score, are well founded, no epithets of reprobation will be too strong for the Constitution of this State. But the truth is, that both of them contain all which, in relation to their objects, is reasonably to be desired.

"I go further, and affirm, that Bills of Rights, in the sense and to the extent they are contended for, are not only unnecessary, in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a pro-

vision would confer a regulating power; but it is evident that it would furnish, to men disposed to usurp, a plausible pretence for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the Press afforded a clear implication that a right to prescribe proper regulations concerning it, was intended to be vested in the National Government. This may serve as a specimen of the numerous handles, which would be given to the doctrine of constructive powers, by the indulgence of an injudicious zeal for Bills of Rights. . . .

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"There remains but one other view of this matter to conclude the point. The truth is, after all the declamation we have heard, that the Constitution is itself, in every rational sense, and to every useful purpose, a *Bill of Rights*. The several Bills of Rights, in Great Britain, form its Constitution, and conversely the Constitution of each State is its Bill of Rights. In like manner the proposed Constitution, if adopted, will be the Bill of Rights of the Union. Is it one object of a Bill of Rights to declare and specify the political privileges of the citizens in the structure and administration of the Government? This is done in the most ample and precise manner in the plan of the Convention; comprehending various precautions for the public security, which are not to be found in any of the State Constitutions. Is another object of a Bill of Rights to define certain immunities and modes of proceeding, which are relative to personal and private concerns? This we have seen has also been attended to, in a variety of cases, in the same plan. Adverting therefore to the substantial meaning of a Bill of Rights, it is absurd to allege that it is not to be found in the work of the Convention. It may be said that it does not go far enough, though it will not be easy to make this appear; but it can with no propriety be contended that there is no such thing. It certainly must be immaterial what mode is observed as to the order of declaring the rights of the citizens, if they are provided for in any part of the instrument which establishes the Government. Whence it must be apparent that much of what has been said on this sub-

ject rests merely on verbal and nominal distinctions, entirely foreign to the substance of the thing.”⁴

Mr. Madison has left an able discussion of this question in his letter to Mr. Jefferson written on the 17th of October, 1788. Speaking of the objections which were urged against the ratification of the Constitution by the several States he observed:

“It is true, nevertheless, that not a few, particularly in Virginia, have contended for the proposed alterations from the most honorable and patriotic motives; and that among the advocates for the Constitution there are some who wish for further guards to public liberty and individual rights. As far as these may consist of a constitutional declaration of the most essential rights, it is probable they will be added; though there are many who think such addition unnecessary, and not a few who think it misplaced in such a Constitution. There is scarce any point on which the party in opposition is so much divided as to its importance and its propriety. My own opinion has always been in favor of a Bill of Rights, provided it be so framed as not to imply powers not meant to be included in the enumeration. At the same time, I have never thought the omission a material defect, nor been anxious to supply it even by *subsequent* amendment, for any other reason than that it is anxiously desired by others. I have favored it because I supposed it might be of use, and, if properly executed, could not be of disservice.

“I have not viewed it in an important light: 1. Because I conceive that in a certain degree, though not in the extent argued by Mr. Wilson, the rights in question are reserved by the manner in which the federal powers are granted. 2. Because there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude. I am sure that the rights of conscience in particular, if submitted to public definition, would be narrowed much more than they are likely ever to be by an assumed power. One of the objections in New England was, that the Constitution, by prohibiting religious tests, opened a door for Jews, Turks, and infidels. 3. Because the limited powers of the federal Government, and the jealousy of the sub-

⁴ The Federalist, No. 84.

ordinate Governments, afford a security which has not existed in the case of the State Governments, and exists in no other. 4. Because experience proves the inefficacy of a bill of rights on those occasions when its controul is most needed. Repeated violations of these parchment barriers have been committed by overbearing majorities in every State.

“In Virginia, I have seen the bill of rights violated in every instance where it has been opposed to a popular current. Notwithstanding the explicit provision contained in that instrument for the rights of conscience, it is well known that a religious establishment would have taken place in that State, if the Legislative majority had found, as they expected, a majority of the people in favor of the measure; and I am persuaded that if a majority of the people were now of one sect, the measure would still take place, and on narrower ground than was then proposed, notwithstanding the additional obstacle which the law has since created.

“Wherever the real power in a Government lies, there is the danger of oppression. In our Governments the real power lies in the majority of the community, and the invasion of private rights is *chiefly* to be apprehended, not from acts of Government contrary to the sense of its constituents, but from acts in which the Government is the mere instrument of the major number of the constituents. This is a truth of great importance, but not yet sufficiently attended to; and is probably more strongly impressed on my mind by facts and reflections suggested by them than on yours, which has contemplated abuses of power issuing from a very different quarter. Wherever there is an interest and power to do wrong, wrong will generally be done, and not less readily by a powerful and interested party than by a powerful and interested prince. The difference, so far as it relates to the superiority of republics over monarchies, lies in the less degree of probability that interest may prompt abuses of power in the former than in the latter; and in the security in the former against an oppression of more than the smaller part of the society, whereas, in the latter, it may be extended in a manner to the whole.

“The difference, so far as it relates to the point in

question—the efficacy of a bill of rights in controuling abuses of power—lies in this: that in a monarchy the latent force of the nation is superior to that of the Sovereign, and a solemn charter of popular rights must have a great effect as a standard for trying the validity of public acts, and a signal for rousing and uniting the superior force of the community; whereas, in a popular Government, the political and physical power may be considered as vested in the same hands, that is, in a majority of the people, and, consequently, the tyrannical will of the Sovereign is not to be controuled by the dread of an appeal to any other force within the community.

“What use, then, it may be asked, can a bill of rights serve in popular Governments? I answer, the two following, which, though less essential than in other Governments, sufficiently recommend the precaution: 1. The political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the National sentiment, counteract the impulses of interest and passion. 2. Although it be generally true, as above stated, that the danger of oppression lies in the interested majorities of the people rather than in usurped acts of the Government, yet there may be occasions on which the evil may spring from the latter source; and on such, a bill of rights will be a good ground for an appeal to the sense of the community. Perhaps, too, there may be a certain degree of danger that a succession of artful and ambitious rulers may, by gradual and well-timed advances, finally erect an independent Government on the subversion of liberty. Should this danger exist at all, it is prudent to guard against it, especially when the precaution can do no injury.

“At the same time I must own that I see no tendency in our Governments to danger on that side. It has been remarked that there is a tendency in *all* Governments to an augmentation of power at the expense of liberty. But the remark, as usually understood, does not appear to me well founded. Power, when it has attained a certain degree of energy and independence, goes on generally to further degrees. But when below that degree, the direct tendency is to further degrees of relaxation, until the

abuses of liberty beget a sudden transition to an undue degree of power. With this explanation the remark may be true; and in the latter sense only is it, in my opinion, applicable to the existing Governments in America. It is a melancholy reflection that liberty should be equally exposed to danger whether the Government have too much or too little power, and that the line which divides these extremes should be so inaccurately defined by experience.

"Supposing a bill of rights to be proper, the articles which ought to compose it admit of much discussion. I am inclined to think that *absolute* restrictions in cases that are doubtful, or where emergencies may overrule them, ought to be avoided. The restrictions, however strongly marked on paper, will never be regarded when opposed to the decided sense of the public; and after repeated violations, in extraordinary cases will lose even their ordinary efficacy. Should a Rebellion or insurrection alarm the people as well as the Government, and a suspension of the *habeas corpus* be dictated by the alarm, no written prohibitions on earth would prevent the measure. Should an army in time of peace be gradually established in our neighborhood by Britain or Spain, declarations on paper would have as little effect in preventing a standing force for the public safety. The best security against these evils is to remove the pretext for them."⁵

Mr. Jefferson answered this letter from Paris, and enumerated the objections which had been made to a Bill of Rights in the Constitution and then answered them:

"The declaration of rights is, like all other human blessings, alloyed with some inconveniences, and not accomplishing fully its object. But the good in this instance, vastly overweighs the evil. I cannot refrain from making short answers to the objections which your letter states to have been raised. 1. That the rights in question are reserved, by the manner in which the federal powers are granted. Answer. A constitutive act may, certainly, be so formed, as to need no declaration of rights. The act itself has the force of a declaration, as far as it goes; and if it goes to all material points, nothing more is wanting. In the draught of a constitution which I had once

⁵ Madison's Writings, Vol. 1, 423-427.

thought of proposing in Virginia, and printed afterwards, I endeavored to reach all the great objects of public liberty, and did not mean to add a declaration of rights. Probably the object was imperfectly executed; but the deficiencies would have been supplied by others, in the course of discussion. But in a constitutive act which leaves some precious articles unnoticed, and raises implications against others, a declaration of rights becomes necessary, by way of supplement. This is the case of our new federal Constitution. This instrument forms us into one State, as to certain objects, and gives us a legislative and executive body for these objects. It should, therefore, guard us against their abuses of power, within the field submitted to them.

"2. A positive declaration of some essential rights could not be obtained in the requisite latitude. Answer. Half a loaf is better than no bread. If we cannot secure all our rights, let us secure what we can.

"3. The limited powers of the federal government, and jealousy of the subordinate governments, afford a security which exists in no other instance. Answer. The first member of this seems resolvable into the first objection before stated. The jealousy of the subordinate governments is a precious reliance. But observe that those governments are only agents. They must have principles furnished them, whereon to found their opposition. The declaration of rights will be the text, whereby they will try all the acts of the federal government. In this view, it is necessary to the federal government also; as by the same text, they may try the opposition of the subordinate governments.

"4. Experience proves the inefficacy of a bill of rights. True. But though it is not absolutely efficacious under all circumstances, it is of great potency always and rarely inefficacious. A brace the more will often keep up the building which would have fallen, with that brace the less. There is a remarkable difference between the characters of the inconveniences which attend a declaration of rights, and those which attend the want of it. The inconveniences of the declaration are, that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate and reparable. The inconveniences

of the want of a declaration are permanent, afflicting and irreparable. They are in constant progression from bad to worse. The executive, in our governments, is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread at present, and will be for many years. That of the executive will come in its turn; but it will be at a remote period.

"I know there are some among us, who would now establish a monarchy. But they are inconsiderable in number and weight of character. The rising race are all republicans. We were educated in royalism; no wonder, if some of us retain that idolatry still. Our young people are educated in republicanism; an apostasy from that to royalism, is unprecedented and impossible. I am much pleased with the prospect that a declaration of rights will be added; and I hope it will be done in that way, which will not endanger the whole frame of government, or any essential part of it."⁶

Notwithstanding the views of Mr. Wilson, Mr. Hamilton, Mr. Madison, and many other distinguished friends of the Constitution, there was a strong feeling that it was not sufficiently explicit on the subjects of personal liberty, religious worship, protection of property, freedom of the press, and those rights generally which relate to the individual and the people. As one writer has expressed it: "In many of the States opposition to the ratification of the Constitution was based upon the absence of specific reservation of the rights of the people. The precedent of the great English declaratory statutes had been followed in the elaborate Bill of Rights which prefaced most of the State constitutions. In vain did the friends of the Constitution urge that the General Government was in its nature limited, and that all rights not expressly granted must be retained. The people did not feel secure in the enjoyment of life, liberty, and property without a written guaranty to protect them from encroachments of the General Government."⁷

Out of this feeling grew the demand for the amendments and each State as it ratified the Constitution re-

⁶ Jefferson's Works, Vol. 3, 3-5.

⁷ Ames' Amendments to the Constitution, 183.

turned to Congress the amendments which its convention had proposed. When Congress investigated them it found that one hundred and seventy-nine amendments had been suggested. In many instances different States had proposed the same amendments, so that the actual number proposed was much less than the total number sent to Congress. They were divided among the States as follows: Massachusetts proposed nine, South Carolina four, North Carolina twenty-six; Virginia twenty, New York thirty-two, and New Hampshire twelve; the minority members in the conventions of Pennsylvania and Maryland had proposed fourteen and twenty-eight respectively, and Virginia and New York each suggested a bill of rights, the first containing twenty and the last twenty-four amendments.^{7a}

On June 8, 1789, six weeks after the organization of the House of Representatives, Mr. Madison, who had given the subject of amending the Constitution especial attention, addressed the House of Representatives and said:

"This day, Mr. Speaker, is the day assigned for taking into consideration the subject of amendments to the Constitution. As I considered myself bound in honor and in duty to do what I have done on this subject, I shall proceed to bring the amendments before you as soon as possible, and advocate them until they shall be finally adopted, or rejected by a constitutional majority of this House. With the view of drawing your attention to this important object, I shall move that this House do now resolve itself into a Committee of the Whole on the state of the Union; by which an opportunity will be given, to bring forward some propositions, which I have strong hopes will meet with the unanimous approbation of this House, after the fullest discussion and most serious regard. I, therefore, move you that the House now go into a committee on this business."⁸

This motion provoked an animated debate, which developed great diversity of opinion concerning the amend-

^{7a} In a note in Miller on the Constitution, 92, it is said that two hundred and one amendments were submitted in all. Ames says that seven States proposed one hundred and twenty-four amendments. Ames' Amendments, 19.

⁸ 1 Annals, 441.

ments. Some members were not in favor of amending the Constitution until the government had a longer experience under the Constitution. Others opposed considering the subject in Committee of the Whole, and a number opposed interrupting the general business of Congress to consider amending the Constitution.

Mr. Madison replied to the several objections, and then submitted a series of eight amendments, some of which contained sub-amendments. These amendments embraced the leading and most important provisions suggested as amendments by the States in their conventions. He then moved that "a committee be appointed to consider and report such amendments as ought to be proposed by Congress to the Legislatures of the States." On finding the temper of the House divided on how the subject should be considered, he moved later that the amendments be adopted by the House. This motion was referred to the Committee of the Whole. On the 21st of July following, Mr. Madison again moved that the House go into a Committee of the Whole on the subject of amendments in pur-

* 1 Annals, 452, 459.

A few days after Madison introduced his amendments Fisher Ames wrote Th. Dwight:

"Mr. Madison has introduced his long-expected amendments. They are fruit of much labor and research. He has hunted up all the grievances and complaints of newspapers, all the articles of conventions and the small talk of their debates. It contains a bill of rights, the right of enjoying property, of changing government at pleasure, freedom of the press, of conscience, of juries, exemption from general warrants, gradual increase of representatives, till the whole number at the rate of one to every thirty thousand shall amount to ———, and allowing two to every State at least. This is the substance. There is too much of it. I had forgot the right of the people to bear arms. *Risum teneatis amici?*

"Upon the whole it may do some good towards quieting men who attend to sounds only, and may get the mover some popularity which he wishes."

On the following day Ames wrote George R. Minot concerning the amendments: "Madison has inserted in his amendments the increase of representatives, each State having two at least. The rights of conscience, of bearing arms, of changing the government, are declared to be inherent in the people. Freedom of the press too. There is a prodigious great dose for a medicine. But it will stimulate the stomach as little as hasty pudding. It is rather food for physic. An immense mass of sweet and other herbs and roots for diet drink." Life and Works of Fisher Ames, vol 1, 52-54.

suance of the resolution of June 8th.¹⁰ This motion prevailed, but this committee was soon discharged from the consideration of the amendments, and a resolution passed that the amendments proposed by Mr. Madison, with those proposed by the States, be referred to a committee of one from each State, called the Committee of Eleven, with instructions to take the subject of amendments into consideration and report to the House, which prevailed.¹¹ The committee reported August 13. On the same day the House resolved itself into a Committee of the Whole to consider the report of the committee.

About this time a very interesting question arose, which now seems as surprising as it was important. Should the amendments be incorporated into the appropriate articles of the Constitution, or submitted separately as amendments to the Constitution? Madison favored incorporating them in the original Constitution in their appropriate places.¹²

On this subject there was much difference of opinion among the members. Mr. Sherman, of Connecticut, thought the amendments should not be incorporated into the original articles, and stated:

"I believe, Mr. Chairman, this is not the proper mode of amending the Constitution. We ought not to interweave our propositions into the work itself, because it will be destructive of the whole fabric. We might as well endeavor to mix brass, iron and clay as to incorporate such heterogeneous articles, the one contradictory to the other. Its absurdity will be discovered by comparing it with the law. Would any Legislature endeavor to introduce into a former act a subsequent amendment, and let them stand so connected? When an alteration is made in an act, it is done by way of supplement; the

¹⁰ 1 Annals, 685.

¹¹ 1 Annals, 690.

The committee consisted of Messrs. Vining, Madison, Baldwin, Sherman, Burke, Gilman, Clymer, Benson, Goodloe, Boudinot and Gale. "Of this number," says Thorpe, "Madison, Baldwin, Sherman, Gilman and Clymer had been in the Convention which adopted the Constitution." Thorpe's Constitutional History of the United States, vol. 2, 224.

¹² 1 Annals, 735.

latter act always repealing the former in any specified case of difference.

"Besides this, sir, it is questionable whether we have the right to propose amendments in this way. The Constitution is the act of the people, and ought to remain entire, but the amendments will be the act of the State Governments. Again, all the authority we possess is derived from that instrument; if we mean to destroy the whole, and establish a new Constitution, we remove the basis on which we mean to build. For these reasons I will move to strike out that paragraph and substitute another."

The paragraph proposed was the following: "*Resolved*, by the Senate and House of Representatives of the United States, in Congress assembled, that the following articles be proposed as amendments to the Constitution, and when ratified by three-fourths of the State legislatures, shall become valid to all intents and purposes, as part of the same."¹⁸

Mr. Madison replied to Mr. Sherman: "Form, sir, is always of less importance than the substance; but on this occasion I admit that form is of some consequence, and it will be well for the House to assume that which upon reflection shall appear to be most eligible. Now, it appears to me that there is a neatness and propriety in incorporating the amendments into the Constitution itself; in that case, the system will remain uniform and entire; it will certainly be more simple when the amendments are interwoven into those parts to which they naturally belong, than it will if they consist of separate and distinct parts. We shall then be able to determine its meaning without references or comparison; whereas if they are supplementary its meaning can only be ascertained by a comparison of the two instruments, which will be a very considerable embarrassment. It will be difficult to ascertain to what arts of the instrument the amendments particularly refer; they will create unfavorable comparisons; whereas, if they are placed upon the footing here proposed, they will stand upon as good foundation as the original work, nor is it so uncommon a thing as generally supposed; systematic men frequently take up the whole

¹⁸ 1 Annals, 734, 735.

law, and with its amendments and alterations, reduce it into one act."¹⁴ Mr. Sherman's resolution was lost.

Mr. Sherman renewed his motion for adding amendments to the Constitution by way of supplement, which started another debate, but this time the motion prevailed by a majority of two-thirds of the House.¹⁵

On the 25th of August the Senate received a message from the House proposing certain articles which the House had adopted as amendments to the Constitution.¹⁶ Some of the Senators did not receive them with favor. Maclay says they were treated contemptuously by Izard, Langdon and Morris. Izard moved they should be postponed until next session. Langdon seconded, and Mr. Morris "got up and spoke angrily but not well." They, however, lost their motion, and Monday was assigned for taking them up.¹⁷

On September 9, the Senate informed the House that it had agreed to a part of the articles the House had proposed as amendments, and disagreed as to others.¹⁸ On the 21st the House sent a message to the Senate saying that it "agreed to the 2nd, 4th, 8th, 12th, 13th, 16th, 18th, 19th, 25th and 26th amendments proposed by the Senate, to articles of amendments to be proposed to the legislatures of the several States, as amendments to the Constitution of the United States;" and "disagreed to the 1st, 3rd, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments; also that a conference was desired with the Senate on the subject matter of the amendments disagreed to; and that Messrs. Madison, Sherman and Vining were appointed managers on the part of the House." On the 25th of September the Senate concurred in the amendments proposed by the House to the amendments of the Senate.¹⁹ The amendments agreed to by both branches of Congress were twelve

¹⁴ 1 Annals, 735, 736.

¹⁵ 1 Annals, 795.

¹⁶ 1 Annals, 73.

¹⁷ Maclay's Journal, 127. Maclay was a Senator from Pennsylvania from 1789 to 1791. He kept a daily journal of the proceedings of the Senate during that time, which is a most interesting and instructive account of the proceedings of the Senate during that period.

¹⁸ 1 Annals, 80.

¹⁹ 1 Annals, 90.

in number, which were transmitted by the President to the governors of the States for ratification or rejection.

After the ratification had been received by Congress, that body appointed a committee to examine the decisions of the States on the amendments. On July 29, 1790, Mr. Steele, chairman of the committee, reported:

"New Hampshire and New York accepted all the articles but the second. Pennsylvania passed over in silence the first and second articles, and accepted the rest. Delaware postponed the first article. Maryland, South and North Carolina and Rhode Island ratified the whole. So that it appears that the first article has been agreed to by six States; the second by five; and all the others by eight."²⁰

It thus appears that of the twelve amendments submitted by Congress to the States, the first and second failed of ratification, while the remaining ten were ratified. The dates of ratification by the States were: New Jersey, November 20, 1789; Maryland, December 19, 1789; North Carolina, December 22, 1789; South Carolina, January 19, 1790; New Hampshire, January 25, 1790; Delaware, January 28, 1790; Pennsylvania, March 10, 1790; New York, March 27, 1790; Rhode Island, June 15, 1790; Vermont, November 3, 1791; Virginia, December 15, 1791. The ratification of the amendments dates from December 15, 1791, when Virginia ratified, making the three-fourths necessary under the Constitution.²¹

²⁰ 2 Annals, 1713-14.

²¹ Various opinions were expressed about the amendments while they were being considered and after their passage, Fisher Ames again wrote Minot:

"We had the amendments on the tapis and referred them to a committee of one from a State. I hope much debate will be avoided by this mode and that the amendments will be more rational and less ad populum than Madison's. It is necessary to conciliate and I would have amendments. But they should not be rash, such as would dishonor the Constitution, without pleasing its enemies. Should we propose them, North Carolina would accede. It is doubtful in case we should not." Life of Ames, vol. 1, 65.

Pierce Butler on August 11, 1789, wrote James Iredell:

"A few milk-and-water amendments have been proposed by Mr. M., such as liberty of conscience, a free press, and one or two general things already well secured. I suppose it was done to keep his promise with his constituents, to move for alterations; but, if I am

An amendment becomes part of the Constitution when

not greatly mistaken, he is not hearty in the cause of amendments." McRea's Iredell, vol. 2, 265.

Richard Henry Lee wrote Patrick Henry September 14, 1789:

"The amendments were far short of the wishes of our convention, but as they are returned by the Senate they are certainly much weakened. The most essential danger from the present system arises, in my opinion, from its tendency to a consolidated government instead of a Union of confederated States." Thorpe's Constitutional History of the United States, vol. 2, 260, 261-n.

From Marshall's Life of Washington we quote the following account of the situation:

"In the course of this session was also brought forward a proposition, made by Mr. Madison, for recommending to the consideration and adoption of the States, several new articles to be added to the Constitution.

"Many of those objections to it which had been urged with all the vehemence of conviction, and which in the opinion of some of its advocates, were entitled to serious consideration, were believed by the most intelligent to exist only in imagination, and to derive their sole support from an erroneous construction of the instrument. Others were upon points on which the objectors might be gratified without injury to the system. To conciliate the affections of their brethren to the government, was an object greatly desired by its friends. Disposed to respect what they deemed the errors of their opponents, where that respect could be manifested without a sacrifice of essential principles, they were anxious to annex to the Constitution those explanations and barriers against the possible encroachments of rulers on the liberties of the people which had been loudly demanded, however unfounded, in their judgments, might be the fears by which those demands were suggested. These dispositions were perhaps, in some measure, stimulated to exertion by motives of the soundest policy. The formidable minorities in several of the conventions, which in the legislatures of some powerful States had become majorities, and the refusal of two States to complete the union, were admonitions not to be disregarded, of the necessity of removing jealousies however misplaced, which operated on so large a portion of society. Among the most zealous friends of the Constitution therefore, were found some of the first and warmest advocates for amendments.

"To meet the various ideas expressed by the several conventions; to select from the mass of alterations which they had proposed those which might be adopted without stripping the government of its necessary powers; to condense them into a form and compass which would be acceptable to persons disposed to indulge the caprice, and to adopt the language of their particular States; were labours not easily to be accomplished. But the greatest difficulty to be surmounted was, the disposition to make those alterations which would enfeeble and materially injure the future operations of the government. At length, twelve articles in addition to and amendment of the Constitution were assented to by two-thirds of both Houses of Congress, and pro-

it is ratified by the last State necessary to complete the three-fourths of the States required by the Constitution.

posed to the legislatures of the several States. Although the necessity of these amendments had been urged by the enemies of the Constitution and denied by its friends, they encountered scarcely any other opposition in the State legislatures, than was given by the leaders of the Anti-Federal party. Admitting the articles to be good in themselves, and to be required by the occasion, it was contended that they were not sufficient for the security of liberty; and the apprehension was avowed that their adoption would quiet the fears of the people, and check the pursuit of those radical alterations which would afford a safe and adequate protection to their rights. Viewing many of those alterations which were required as subversive of the fundamentals of the government, and sincerely desirous of smoothing the way to a reunion of political sentiment by yielding in part to objections which had been pronounced important, the Federalists, almost universally, exerted their utmost powers in support of the particular amendments which had been recommended. They were at length ratified by the legislatures of three-fourths of the States, and probably contributed in some degree, to diminish the jealousies which had been imbibed against the Federal Constitution." *Marshall's Life of Washington*, vol. 5, 207-210.

CHAPTER LI.

FIRST AMENDMENT.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The great purpose of the first clause of this amendment was to secure religious freedom from governmental recognition or interference. While Christianity has been adopted by the people of the United States as their religion, there is no acknowledgment of that religion by any national expression or authority.

The object of the government in this relation is to refrain from any recognition of union between State and Church.

Perhaps the sentiment of the American people has never been more comprehensively stated on this subject than it was by Mr. Justice Miller in *Watson v. Jones*,¹ where he said:

“In this country the full and free right to entertain any religious belief, to protect any religious principle and to teach any religious doctrine which does not violate the laws, morality and property, and which does not infringe personal rights, is conceded to all.”

As introduced by Madison in the House of Representatives this amendment differs materially from its present reading. In his form it consisted of three clauses and read:

“The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner or on any pretext, infringed.

¹ 13 Wallace, 679, 728.

"The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable.

"The people shall not be restrained from peaceably assembling and consulting for their common good; nor from applying to the Legislature by petitions, or remonstrances, for redress of their grievances."^{1a}

This language Mr. Madison desired to have inserted in the ninth section of the first article of the Constitution, between the third and fourth clauses. The amendment occasioned considerable debate in the House and was then referred to the Committee of Eleven.

The committee reported the article in two clauses, which read:

"1. No religion shall be established by law, nor shall the equal rights of conscience be infringed.

"2. The freedom of speech and of the press and the right of the people peaceably to assemble and consult for their common good, and to apply to the Government for redress of grievances, shall not be infringed."²

This report was the cause of another important debate on the first clause of Madison's amendment.

Mr. Sherman regarded the amendment as wholly unnecessary, as Congress had no authority delegated to it by the Constitution to make religious establishments; and he therefore moved to strike the clause out.

^{1a} 1 Annals, 451.

² Thorpe's Constitutional History of the United States, vol. 2, 225.

The device on the silver dollar, "In God We Trust," can not be regarded as a governmental expression on the subject of religion.

But there seems to be an acknowledgment by the Government through the Department of State, "that the Government of the United States is not in any sense founded on the Christian religion." This somewhat strange provision is found in the 11th article of the treaty of peace between the United States of America and the Bey and Subjects of Tripoli, of Barbary: "As the government of the United States of America is not in any sense founded on the Christian religion—as it has in itself no character of enmity against the laws, religion or tranquillity of Mussulmans—and as the said States never have entered into any war or act of hostility against any Mahometan nation, it is declared by the parties, that no pretext arising from religious opinions shall ever produce an interruption of the harmony existing between the two countries." 8 U. S. Statutes at Large, 155.

Mr. Carroll replied: "As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hands; and as many sects have concurred in opinion that they are not well secured under the present Constitution," he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed.

Mr. Madison apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words were necessary or not, he did not mean to say, but they have been required by some of the State conventions, who seemed to entertain an opinion that under the clause of the Constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the Constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of the language would admit. | |

Mr. Huntington feared that the words might be taken in such latitude as to be extremely hurtful to the cause of religion.

Mr. Madison thought, if the word "national" was inserted before religion, it would relieve the objections made to the report. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform, and believed if the word "national" was introduced, it would point the amendment directly to the object it was intended to prevent.

Mr. Livermore was not satisfied with the amendment, and suggested that it be made to read: "That Congress shall make no laws touching religion, or infringing the rights of conscience."

Mr. Gerry did not like the term "national" as proposed by Mr. Madison. It brought to his mind some observations that had taken place in the conventions at the

time they were considering the present Constitution. Those who were called Anti-Federalists at that time complained that they had injustice done them by the title, because they were in favor of a Federal Government; and the others were in favor of a National one; the Federalists were for ratifying the Constitution as it stood, and the others not until amendments were made. Their names then ought not to be distinguished by Federalists and Anti-Federalists, but Rats and Antirats.³

✓ The motion of Mr. Livermore was then passed by a vote of thirty-one in its favor, and twenty against it.⁴

11 The matter was referred to a committee of three, which on August 24, 1789, reported: "Congress shall make no law establishing religion, or prohibiting the free exercise thereof; nor shall the rights of conscience be infringed."⁵

↳ Concerning freedom of speech, etc., the committee reported: "The freedom of speech and of the press and of the right of the people peaceably to assemble and to apply to the Government for redress of grievances, shall not be infringed."⁶

When reported to the House this created another debate.

Mr. Sedgwick feared that such an amendment would tend to make its provisions trifling in the eyes of their constituents. "What," said he, "shall we secure the freedom of speech, and think it necessary, at the same time, to allow the right of assembling? If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question; it is derogatory to the dignity of the House to descend to such *minutiae*." He then moved to strike out "assemble and," on which another debate occurred.⁷

The whole subject as reported by Mr. Madison and by

³ This is probably the origin of that abbreviation which appeared in the early history of American politics, known as "Rats and Antirats." Judging from the language of Mr. Gerry, the *Rats* were in favor of *ratifying* the Constitution and the *Antirats* were opposed to *ratifying* it.

⁴ 1 Annals, 757-759.

⁵ Thorpe's Constitutional History of U. S., vol. 2, 257.

⁶ Thorpe's Constitutional History, vol. 2, 257.

⁷ 1 Annals, 759.

the two committees to whom it was referred was gone over in the Senate and House, and then referred to a committee of conference, which reported the amendment as found in the Constitution. By the rejection of the first and second articles as reported by Congress, this became the first amendment to the Constitution.*

The amendment in question is susceptible of three subdivisions:

First, that Congress should make no law respecting an establishment⁹ of religion, or prohibiting the free exercise thereof;

Second, Congress should make no law abridging the freedom of speech or of the press;

Third, Congress should make no law abridging the right of the people peaceably to assemble and to petition the Government for the redress of grievances.

Congress shall make no law respecting an establishment of Religion, or prohibiting the free exercise thereof.

Though at the time of the formation of the Constitution many of the State constitutions contained provisions on the subject of religion and the clergy, and though Mr. Pinckney's plan for a Constitution contained a clause that "The Legislature of the United States shall pass no law on the subject of religion," we find the origin of this clause in the history of the Episcopal Church in Virginia. In 1784 there was introduced in the General Assembly of that Commonwealth an act which was intended to establish the Episcopal Church permanently and which levied a

* 1 Annals, 948.

What is now the first amendment was rejected by the Senate but was afterwards inserted upon the earnest request of the House. Ames on Amendments, 184.]

⁹ The word "establishment" means in this connection a national religion, which is recognized and supported by the government. Paschal on the Constitution, 254.

While adopting the Constitution the States of New Hampshire, New York, Virginia and North Carolina included declarations concerning religious freedom among the changes they wished to make in the Constitution. In North Carolina the convention declined to ratify the Constitution until such an amendment was acted upon. Reynolds v. United States, 98 U. S., 164.

general tax for the support of its clergy. Each male person over sixteen years of age was to give ten pounds of tobacco and one bushel of corn to the support of the Church, and each minister was to receive fifteen hundred pounds of tobacco and sixteen bushels of corn.¹⁰

The act did not create that respect for the clergy or the church which they should have commanded. Little by little a feeling of dislike developed against the established church and finally it settled into open hostility. The people believed that the church party sought to govern the colony. This intensified their feeling, and the sentiment, though checked, was not extinguished even by the Revolution.

Shortly after the close of that struggle, according to one historian, "The established church, which had been stung by the blows previously inflicted, began to exhibit signs of life. A peculiar influence aided its struggle. While the Assembly was in session petitions from various counties were presented praying that a 'general assessment' should be laid on the people for religious support. At the same session of the Assembly a resolution was passed declaring 'that acts ought to pass for the incorporation of all societies of the Christian religion which might apply for the same.' At once the Episcopal Church applied for incorporation, and an act was passed accordingly. The act provided that the 'minister and vestry of each parish should be a body corporate, with power to purchase, have, and hold property, and to sue and be sued.' It transferred to these corporations all the glebes, lands, parsonages, churches, chapels, books, plate, ornaments, and everything that had been considered the property of the late establishment. It also empowered the churches to purchase, use and enjoy other property, provided its income did not exceed a stated limitation. Vestries were to be elected once in three years by the people; but no person was to vote unless he was a member of the Episcopal Church contributing to its support."¹¹

Public sentiment rapidly crystallized against this position. The Episcopal Church was the only one which made application for the benefit of the law, while at

¹⁰ Howison's History of Virginia, vol. 2, 149.

¹¹ Howison's History of Virginia, vol. 2, 294, 295.

least one other ecclesiastical body had protested against its passage, believing it to be detrimental to religious liberty.¹² Public feeling became greatly aroused and a controversy was begun which gave the world two notable contributions, to the annals of literature, legislation and religion.

In opposition to the bill, which was still pending in the General Assembly, Madison wrote his famous memorial, which is said to have been one of the best "compositions ever produced, even by his great mind. Transparent in style, moderate yet firm in temper, graceful in proportion, strong in argument, it treats its subject with a power not to be resisted. It urged that the system of assessment was vicious, because it gave civil government control in religion; because it verged to a union of church and state; because it violated equality, in requiring men to support that to which they might not have assented; because it made the civil magistrate a judge in matters of faith; because it was unnecessary for the support of Christianity, who lives best upon the free love of her children; because it tended to produce indolence and vice, rather than purity and zeal."¹³

When the vote was finally taken the bill was defeated by a small majority, doubtless largely because of Madison's memorial against it.

While the controversy was engaging the attention of the people of Virginia, Jefferson prepared, and the General Assembly of the State passed, the famous act "For Establishing Religious Freedom," which attracted the attention of the civilized world. The act itself contains but two short sections, but they were preceded by a lengthy preamble which was a powerful appeal for independence of thought and feeling in matters of religion. The following is the act in full:

"I. *Whereas, Almighty God* hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy Author of our religion, who being Lord both of body and mind, yet chose not to propa-

¹² Howison's History of Virginia, vol. 2, 296.

¹³ Howison's Virginia, vol. 2, 297.

gate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavoring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right; that it tends only to corrupt the principles of that religion it is meant to encourage by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed those are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square

with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them:

"II. *Be it enacted by the General Assembly*, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

"III. And though we well know that this assembly elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall be hereafter passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right."¹⁴

¹⁴ Virginia Statutes at Large, vol. 12, 84-86.

Referring to the Virginia act for religious freedom, Jefferson wrote from Paris to Madison December 18, 1786, as follows:

"The Virginia act for religious freedom has been received with infinite approbation in Europe and propagated with enthusiasm. I do not mean by the governments, but by the individuals who compose them. It has been translated into French and Italian, has been sent to most of the courts of Europe, and has been the best evidence of the falsehood of those reports which stated us to be in anarchy. It is inserted in the new Encyclopedie, and is appearing in most of the publications respecting America. In fact, it is comfortable to see the standard of reason at length erected, after so many ages, during which the human mind has been held in vassalage by kings, priests and nobles; and it is honorable for us to have produced the first

This act was the result of the feeling which had spread throughout the State in opposition to the established church. The influence of that institution in England was understood by the honest and intelligent people of Virginia, and they were thoroughly aroused against it. It is possible that, largely through the influence of Madison and Jefferson, public sentiment swung too far in the opposite direction. At least, it placed upon the statute book of Virginia the most powerful arraignment of the established church and its influence in legislation which had ever been written. This was but five years before Madison submitted the amendment in question to the first American Congress for adoption.

History would seem to justify the conclusion that in presenting this particular amendment he was reflecting the successful sentiment in the mighty struggle which had been carried on in his State over the question of religious freedom. The spirit as well as the language of the amendment was that the general government should forever refrain from manifesting any preference concerning any particular religion; that it must take no part in formulating or establishing a religion of any kind, nor must it prohibit to any person the free and unfettered enjoyment of the religion of his choice. As a covenant between the government and the people on this subject, Congress submitted this amendment, which was promptly ratified by the requisite number of States. It was not aimed at the progress of Christianity, or intended to impede its influence.

Mr. Justice Story has well said:

"The real object of the amendment was not to countenance, much less to advance, Mahometanism or Judaism or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which

legislature who had the courage to declare, that the reason of man may be trusted with the formation of his own opinions." Ford's Jefferson, vol. 4, 334.

had been trampled upon almost from the days of the Apostles to the present age."¹⁵

It secured forever in the United States the separation of Church and State, and prevents for all time national recognition of any particular religious creed, while it does not impair the glory nor diminish the luster of Christianity. In his second inaugural address President Jefferson correctly stated the position of the government to be:

"In matters of religion I have considered that its free exercise is placed by the Constitution independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the Church or State authorities acknowledged by the several religious societies."¹⁶

Again in 1808 Jefferson wrote:

"I consider the Government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline or exercises. This results not only from the provision that no law shall be made respecting the establishment, or free exercise, of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general Government. It must then rest with the State, as far as it can be in any human authority."¹⁷

So sensitive was Mr. Madison concerning the exercise by the general government of any power on the subject of religion, that when he was President he declined to sign a bill entitled, "An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia," but returned it to the House of Representatives with the following objections:

"*Because* the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States

¹⁵ 2 Story on the Constitution, 631, 632.

¹⁶ Messages of the Presidents, vol. 1, 379.

¹⁷ Ford's Life of Jefferson, vol. 9, 174.

which declares that 'Congress shall make no law respecting a religious establishment.' The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and polity of the church incorporated, and comprehending even the election and removal of the minister of the same, so that no change could be made therein by the particular society or by the general church of which it is a member, and whose authority it recognizes. This particular church, therefore, would so far be a religious establishment by law, a legal force and sanction being given to certain articles in its constitution and administration. Nor can it be considered that the articles thus established are to be taken as the descriptive criteria only of the corporate identity of the society, inasmuch as this identity must depend on other characteristics, as the regulations established are generally unessential and alterable according to the principles and canons by which churches of that denomination govern themselves, and as the injunctions and prohibitions contained in the regulations would be enforced by the penal consequences applicable to a violation of them according to the local law.

*"Because the bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty."*¹⁸

Seven days later, on the 28th of February, 1811, he sent the following communication to the House of Representatives, "having examined and considered the bill entitled 'An act for the relief of certain persons, naming them, and the Baptist Church at Salem Meeting House, in the Mississippi Territory,' I now return the same to the House of Representatives, in which it originated, with the following objections:

"Because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and precedent for the appropriation

¹⁸ Messages of the Presidents, vol. 1, 490.

of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.'"¹⁹

Federal decisions respecting the establishment of religion.—In the early case of *Permoli v. First Municipality*,²⁰ the question arose in this way: The first municipality of New Orleans passed an ordinance imposing a penalty on any priest who should officiate at any funeral in any church other than the Obituary Chapel. The plaintiff in error was a Roman Catholic priest, who was proceeded against for violation of the ordinance. For his defense he filed the following answer:

"This respondent, for answer, says, true it is that the corpse of Mr. Louis Le Roy, deceased, was brought (inclosed in a coffin) in the Roman Catholic Church of the St. Augustin, and there exposed; and that when there thus exposed, this respondent, as stated in the complaint, officiated on it, by blessing it, by reciting on it all the other funeral prayers and solemnity, all the usual funeral ceremonies prescribed by the rites of the Roman Catholic religion, of which this respondent is a priest. That in this act he was assisted by two other priests, and by the chanters or singers of the said church.

"This respondent avers, that in so doing he was warranted by the Constitution and laws of the United States, which prevent the enactment of any law prohibiting the free exercise of any religion. He contends that the ordinance on which the complainants rely is null and void, being contrary to the provisions of the act of incorporation of the city of New Orleans, and to those of the Constitution and laws of the United States, as above recited."

In delivering the opinion of the court Catron, Justice, said (p. 609):

"The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States. We

¹⁹ Messages of the Presidents, vol. 1, 490.

²⁰ 3 Howard, 589, 609.

must look beyond the Constitution for the laws that are supposed to be violated; and on which our jurisdiction can be founded." The conclusion was that the court could not afford relief.

The provision that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, applies to the Territories as well as to the States; it includes the whole of the United States, and Congress could no more exercise this power in a territory than in a State.

The Chief Justice in the case of *Reynolds v. The United States* said:

"Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as Congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

"The word 'religion' is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed?

"Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration 'A bill establishing provision for teachers of the Christian religion,' postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested

'to signify their opinion respecting the adoption of such a bill at the next session of assembly.'

"This brought out a determined opposition. Amongst others, Mr. Madison prepared a 'Memorial and Remonstrance,' which was widely circulated and signed, and in which he demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government. At the next session the proposed bill was not only defeated, but another, 'for establishing religious freedom,' drafted by Mr. Jefferson, was passed. In the preamble of this act religious freedom is defined, and after a recital 'that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty,' it is declared 'that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order.' In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

"In a little more than a year after the passage of this statute the Convention met which prepared the Constitution of the United States. Of this Convention Mr. Jefferson was not a member, he then being absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. Five of the States, while adopting the Constitution, proposed amendments. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon.

"Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the ad-

vocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: 'Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.' Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order."²¹

✓ **Religion cannot be pleaded as a defense to crime.**—This amendment will not permit religion to be pleaded in defense of crime, or in justification of a doctrine offensive to civilization or enlightened society.

Mr. Justice Field, in *Davis v. Beason*,²² said (p. 341):

✓ **"Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. They are crimes by the laws of the United States, and they are crimes by the laws of Idaho. They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Few crimes are more pernicious to the best interests of society and receive more general or more deserved punishment. To extend exemption from punishment for such crimes would be to shock the moral judgment of the community. To call their ad-**

²¹ *Reynolds v. United States*, 98 U. S., 145, 162, 163, 164.

²² 133 U. S., 333, 341.

vocacy a tenet of religion is to offend the common sense of mankind. If they are crimes, then to teach, advise and counsel their practice is to aid in their commission, and such teaching and counselling are themselves criminal and proper subjects of punishment, as aiding and abetting crime are in all other cases."

Judicial definition of religion.—"The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but it is distinguishable from the latter. The first amendment to the Constitution, in declaring that Congress shall make no law respecting the establishment of religion, or forbidding the free exercise thereof, was intended to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect. 7

"The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question. It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society. With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with. 14

"However free the exercise of religion may be, it must be subordinate to the criminal laws of the country, passed with reference to actions regarded by general consent as properly the subjects of punitive legislation. There have been sects which denied as a part of their religious tenets that there should be any marriage tie, and advocated promiscuous intercourse of the sexes as prompted by the passions of its members. And history discloses the fact that the necessity of human sacrifices, on special occasions, has been a tenet of many sects. Should a sect of either of these kinds ever find its way into this country, swift punishment would follow the carrying into effect of its doctrines, and no heed would be given to the pretence that, as religious beliefs, their supporters could be protected in their exercise by the Constitution of the United States. Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts, recognized by the general consent of the Christian world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance."

In *Mormon Church v. The United States*,²³ Justice Bradley stated in reference to the practice of that Church:

"One pretence for this obstinate course is, that their belief in the practice of polygamy, or in the right to indulge in it, is a religious belief, and, therefore, under the protection of the constitutional guaranty of religious freedom. This is altogether a sophistical plea. No doubt the Thugs of India imagined that their belief in the right of assassination was a religious belief; but their thinking so did not make it so. The practice of suttee by the Hindu widows may have sprung from a supposed religious conviction. The offering of human sacrifices by our own ancestors in Britain was no doubt sanctioned by an equally conscientious impulse. But no one, on that account, would hesitate to brand these practices, now, as crimes against society, and obnoxious to condemnation and punishment by the civil authority. The State has

²³ 136 U. S., 1, 49, 50.

a right to prohibit polygamy and all other open offenses against the enlightened sentiment of mankind, notwithstanding the pretence of religious conviction by which they may be advocated and practiced."

An act of Congress appropriated a sum of money for the construction of two buildings in the city of Washington to be erected in the discretion of the District Commissioners on grounds belonging to a hospital, and to be conducted as part of the hospital. The Commissioners entered into an agreement with a private hospital which was in charge of the Roman Catholic Church. It was sought to prohibit the payment of the appropriation because the contract of the Commissioners was contrary to the first amendment. But the Supreme Court of the United States in *Bradfield v. Roberts*,²⁴ held that the act of Congress making the appropriation did not show that there was anything sectarian in the corporation, and "the specific and limited object of its creation" was the opening and keeping a hospital in the city of Washington for the care of such sick and invalid persons as might place themselves under the treatment and care of the corporation, and that the right to make the agreement was within the discretion of the Commissioners and a proper exercise thereof. It was the unanimous judgment of the court that the act of Congress did not conflict with this amendment.

So thoroughly and universally is the spirit of religious freedom established in the United States that perhaps there is not a State in the federal Union which does not have a clause in its Constitution similar to that in the federal Constitution on the subject of freedom of religious belief.

An extended examination of this subject is beyond the compass of this work and cannot be undertaken, but some of the more important decisions of the State courts concerning it will be cited. The decisions of these courts as will appear, are not unanimous on the question whether school authorities in the exercise of their rightful discretion can compel the Bible to be read by the pupils in the public schools.

The Constitution of Ohio provides: "Religion, morality,

²⁴ 175 U. S., 291, 299.

and knowledge, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction.”²⁵ No law having been passed by the legislature of the State in relation to the matter, except general statutes which gave broad, discretionary views to boards of education concerning the management of the schools, a resolution was passed by the Board of Education of Cincinnati “that religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati; it being the true object and intent of this rule to allow the children of the parents of all sects and opinions in matters of faith and worship to enjoy alike the benefit of the common school fund.” Claiming that this resolution was against public policy and public morality and in violation of the spirit and purpose of the Constitution, certain citizens of Cincinnati brought an action to enjoin the enforcement of the resolution. The Superior Court granted the prayer of the injunction. The case was taken to the Supreme Court of the State, where the judgment of the lower court was reversed, and the doctrine was established that the constitution did not enjoin or require religious instruction, or the reading of religious books, in the public schools of the State; that the legislature having placed the management of the public schools under the exclusive control of directors, trustees, and boards of education, the courts have no rightful authority to interfere by directing what instruction shall be given, or what books shall be read in the schools. In the opinion it was said by Judge Welch (pp. 248-250):

“Religion is not—much less is Christianity or any other particular system of religion—named in the preamble to the Constitution of the United States as one of the declared *objects* of government; nor is it mentioned in the clause in question, in our own constitution, as being essential to anything *beyond* mere human government. Religion is ‘essential’ to much more than human government. It is essential to man’s spiritual interests, which

²⁵ Art. 1, sec. 7, Ohio Constitution.

rise infinitely above, and are to outlive, all human governments. It would have been easy to declare this great truth in the Constitution; but its framers would have been quite out of their proper sphere in making the declaration. They contented themselves with declaring that religion is essential to good government; providing for the protection of all in its enjoyment, each in his own way, and providing means for the diffusion of general knowledge among the people. The declaration is, not that government is essential to good religion, but that religion is essential to good government. Both propositions are true, but they are true in quite different senses. Properly speaking, there is no such thing as 'religion of State.' What we mean by that phrase is, the religion of some individual, or set of individuals, taught and enforced by the State. The State can have no religious opinions; and if it undertakes to enforce the teaching of such opinions, they must be the opinions of some natural person, or class of persons. If it embarks in this business, whose opinion shall it adopt? If it be true that our law enjoins the teaching of the Christian religion in the schools, surely, then, all its teachers should be Christians. Were I such a teacher, while I should instruct the pupils that the Christian religion was true and all other religions false, I should tell them that the law itself was an *unchristian* law. One of my first lessons to the pupils would show it to be unchristian. That lesson would be: 'Whatsoever ye would that men should do to you, do ye even so to them; for this is the *law* and the prophets.' I could not look the veriest infidel or heathen in the face, and say that such a law was just, or that it was a fair specimen of Christian republicanism. I should have to tell him that it was an outgrowth of false Christianity, and not one of the 'lights' which Christians are commanded to shed upon an unbelieving world. I should feel bound to acknowledge to him, moreover, that it violates the spirit of our constitutional guaranties, and is a State religion in embryo; that if we have no right to tax him to support 'worship,' we have no right to tax him to support religious instructions; that to tax a man to put down his own religion is the very essence of tyranny; that however small the tax, it is a first step in the

direction of an 'establishment of religion;' and I should add, that the first step in that direction is the fatal step, because it logically involves the last step."²⁶

But some of the States have held differently. In Massachusetts it was decided that the power of a school committee of a town to pass reasonable rules and regulations for the government, discipline and management of the schools authorized the committee to pass an order that the "schools should be opened each morning with reading from the Bible and prayer, and that during the prayer the scholars should bow their heads." Bigelow, Chief Justice, in his opinion said:

"We do not mean to say that it would be competent for a school committee to pass an order or regulation requiring pupils to conform to any religious rite or observance, or to go through any religious form of ceremonies, which were inconsistent with or contrary to their religious conviction or conscientious scruples. Such a requisition would be a violation of the spirit of the clause in the Constitution, which provides, that no one shall be hurt, or molested in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience; and it would be also inconsistent with the plain intention of the legislature in providing 'that no one shall be excluded from the public school on account of his religious opinions.' But we are unable to see that the regulation required by the board can be justly said to fall within this category. It did not prescribe an act which was necessarily one of devotion, or religious ceremony, it went no further than to require the observance of quiet and decorum during the religious service with which the school was opened. It did not compel a pupil to join in the prayer, but only to assume an attitude which was calculated to prevent interruption by avoiding all communication with others during the service."

The judgment of the Court was, that the committee had authority to pass such an order, but that the scholars should be excused from bowing their heads during the prayer if parents should request the same.²⁷

²⁶ Board of Education v. Minor, 23 O. S., 211, 248, 250.

²⁷ Spiller v. Inhabitants of Woburn, 12 Allen, 127, 129.

The Constitution of Nebraska contained a clause that "All persons have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences. No person shall be compelled to attend, erect, or support, any place of worship, against his consent, and no preference shall be given by law to any religious society, nor shall any interference with the rights of conscience be permitted." Also, "No sectarian instruction shall be allowed in any school or institution supported, in whole or in part, by the public funds set apart for educational purposes." A school board in that State permitted a teacher employed by them in one of the public schools to engage daily in school hours in the public school building and in the presence of the pupils, in certain religious and sectarian exercises, which would consist in reading passages of her own selection from the Bible, and in singing certain religious and sectarian songs and in offering prayer to the Deity according to the customs and usages of orthodox Evangelical churches. The pupils joined in the singing of such songs or hymns. The Court held that such exercises constituted religious worship and were sectarian in their character and were consequently in contravention of the provisions of the State Constitution.²⁸

The Constitution of Michigan contained a clause that: "The legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience, or to compel any person to attend, erect, or support any place of religious worship, or to pay tithes, taxes, or other rates for the support of any minister of the Gospel or teacher of religion." Also, "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect, or society, theological or religious seminary, nor shall property belonging to the State be appropriated for any such purposes."

In the city of Detroit in some of the schools the teachers for a period of fifteen minutes at the close of the school day read from a book entitled, "Readings from the Bible," which was largely made up of extracts from the Bible which emphasized the moral precepts of the Ten Commandments. The teacher was forbidden to make any

²⁸ State v. Scheve, 65 Nebraska, 853-871.

comment upon the matter contained in the book and was required to excuse from that part of the session of the school any pupil upon application of his parent or guardian. It was held that this was not a violation of the Constitution of that State.²⁹

The question was also considered by the Supreme Court of Wisconsin in *State ex rel. v. District Board, etc.*³⁰ The Constitution of that State provided that, "The right of every man to worship Almighty God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship; nor shall any control of, or interference with the right of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship." Another provision was (p. 217): "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable, and such schools shall be *free*, and without charge for tuition, to *all* children between the ages of four and twenty years, and no sectarian instruction shall be allowed therein." A teacher in one of the district schools was accustomed to read daily from the Bible, but without making any comment on what was read, and it appears that those pupils who did not desire to be present while such reading was being had were excused. The Court held that the use of any version of the Bible as a text-book in the public schools and the reading thereof in such schools by a teacher, though such readings were not accompanied by any comment, had a tendency "to inculcate sectarian ideas" within the meaning of the State Constitution, and were therefore prohibited by that instrument. And the fact that children who did not desire to be present while such readings occurred were excused from attendance did not remove the ground of objection.

A clause in a statute of Iowa read: "The Bible shall not be excluded from any school or institution in this State; nor shall any pupil be required to read it contrary to the wishes of his parent or guardian." The teachers of the public schools in that State were accustomed to read a portion of the Bible daily and to sing

²⁹ *Pfeifer v. Board of Education of Detroit*, 118 Mich. Rep., 560.

³⁰ 76 Wisconsin, 177.

religious songs in the schools. Suit was brought to enjoin such action on the part of the teachers. The Supreme Court of the State held that under the statutory provision it was a matter of individual option with teachers whether they would read from the Bible in school or not; that such option was restricted only by the provision of the statute that "No pupil should be required to read from the Bible contrary to the wishes of his parent or guardian." The provision of the Constitution of the State on this subject was: "The General Assembly shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; nor shall any person be compelled to attend any place of worship, to pay tithes, taxes, or other rates for building or repairing places of worship, for the maintenance of any minister or ministry." The Court held (p. 369): "The object of the provision, is not to prevent the casual use of a public building as a place for offering prayer, or doing other acts of religious worship, but to prevent the enactment of a law whereby any person could be compelled to pay taxes for building or repairing any place designed to be used distinctively as a place of worship and thereby to prevent an improper burden." "It perhaps would not be denied," said the Court, "that the principle carried out to its extreme logical results might be sufficient to justify an injunction against such conduct on the part of the teachers, yet we cannot think that the people of Iowa, in adopting a Constitution, had such extreme view in mind. We do not think that the plaintiff's real objection grows out of the matter of taxation. We infer from his argument that his real objection is that religious exercises are made a part of the educational system into which his children must be drawn, or made to appear singular and perhaps be subjected to some inconvenience. But, so long as the plaintiff's children are not required to be in attendance at the exercises we cannot regard the objection as one of great weight."⁸¹

These cases show that the holdings of the Courts are not unanimous as to the effect of a provision that where religious exercises are held in a school, children whose parents do not believe in such exercises can be excused

⁸¹ Moore v. Monroe et al., 64 Iowa, 367-369.

from attendance at school during that time, but they sustain the general principle that there must be no interference with religious belief, and there does not seem to be a Constitution in any State which does not contain a provision against such interference.

Judge Cooley, the eminent constitutional authority, has made the following classification "of those things which are not lawful under any of the American Constitutions:"

1. "Any law respecting an establishment of religion. The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution, and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.

2. "Compulsory support, by taxation, or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it.

3. "Compulsory attendance upon religious worship. Whoever is not led by choice or a sense of duty to attend upon the ordinances of religion is not to be compelled to do so by the State. It is the province of the State to enforce, so far as it may be found practicable, the obligations and duties which the citizen may be under or may owe to his fellow-citizens or to society; but those which spring from the relations between himself and his Maker are to be enforced by the admonitions of the conscience and not by the penalties of human laws. Indeed, as all real worship must essentially and necessarily consist in the free-will offering of adoration and gratitude by the creature to the Creator, human laws, are obviously inadequate to incite or compel those internal and voluntary emotions which shall induce it, and human penalties at most could only enforce the observance of idle

ceremonies, which, when unwillingly performed, are alike valueless to the participants and devoid of all the elements of true worship.

4. "Restraints upon the free exercise of religion according to the dictates of the conscience. No external authority is to place itself between the finite being and the Infinite when the former is seeking to render the homage that is due, and in a mode which commends itself to his conscience and judgment as being suitable for him to render, and acceptable to its object.

5. "Restraints upon the expression of religious belief. An earnest believer usually regards it as his duty to propagate his opinions, and to bring others to his views. To deprive him of this right is to take from him the power to perform what he considers a most sacred obligation.

"These are the prohibitions which in some form of words are to be found in the American constitutions, and which secure freedom of conscience and of religious worship. No man in religious matters is to be subjected to the censorship of the State or of any public authority; and the State is not to inquire into or take notice of religious belief, when the citizen performs his duty to the State, and to his fellows, and is guilty of no breach of public morals or public decorum."²²

²² Cooley's Constitutional Limitations, 663, 668.

The Constitutions of several States at the time of the adoption of the Constitution contained provisions relative to religious liberty:

Delaware: "There shall be no establishment of any one religious sect in this State in preference to another; and no clergyman or preacher of the Gospel of any denomination shall be capable of holding any civil office in this State, or of being a member of either of the branches of the legislature, while they continue in the exercise of the pastoral function." Poore's Charters, vol. 1, 277.

New Hampshire: "Every individual has a natural and unalienable right to worship God according to the dictates of his own conscience and reason; and no subject shall be hurt, molested or restrained in his person, liberty, or estate for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession, sentiments or persuasion; provided he doth not disturb the public peace, or disturb others in their religious worship." Poore's Charters, vol. 2, 1281.

South Carolina: The Constitution of 1778 provided that "All persons and religious societies who acknowledge that there is one God, and a future state of rewards and punishments, and that God is publicly to be worshipped, shall be freely tolerated. That previous to the

Congress shall make no law abridging the freedom of speech or of the press.

establishment and incorporation of the respective societies of every denomination as aforesaid, and in order to entitle them thereto, each society so petitioning shall have agreed to and subscribed in a book the following five articles, without which no agreement or union of men upon pretense of religion shall entitle them to be incorporated and esteemed as a church of the established religion of this State:

"First, That there is one Eternal God, and a future state of rewards and punishments. Second, That God is publicly to be worshipped. Third, That the Christian religion is the true religion. Fourth, That the Holy Scriptures of the Old and New Testaments are of Divine inspiration, and are the rule of faith and practice. Fifth, That it is lawful and the duty of every man being thereunto called by those that govern, to bear witness to the truth." Poore's Charters, vol. 2, 1626.

Georgia: "All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State; and shall not, unless by consent, support any teacher or teachers except those of their own profession." Poore's Charters, vol. 1, 383.

Virginia: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other." Poore's Charters, vol. 2, 1909.

President Grant in his last annual message in 1875 recommended that "No sectarian tenets shall ever be taught in any school supported in whole or in part by the State, Nation, or by the proceeds of any tax levied upon any commodity." Messages of the President, Vol. 7, 356.

For the purpose of carrying out the suggestion of the President, Mr. Blaine in 1876 introduced into the House of Representatives the following proposed amendment to the Constitution:

"No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof: and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations." Cong. Globe, 44 Cong. 1 sess. Aug. 4, p. 5188.

This amendment passed the House of Representatives on August 4, 1876, by a vote of 180 to 7. After being slightly changed by amendment in the Senate, it was defeated in that body by a vote of 28 to 16. Two years later an amendment was proposed which prohibited any State from passing any law respecting an establishment of religion or the appropriation of any public money to the support of sectarian schools, but neither of these proposed amendments passed Congress.

It was not until a comparatively late date that these great agencies of modern civilization were recognized. Neither the Petition of Right in 1628 nor the Bill of Rights in 1689 made any reference to freedom of the press.

Constitutional history furnishes few more interesting subjects than freedom of speech or liberty of the press. Concerning these subjects the sentiments of the English people underwent one of those great changes which resulted in revolutionizing the practice and conduct of the nation. Under the common law, freedom of speech and of the press was greatly circumscribed, and it was regarded as a prerogative of the Crown to regulate what should be published; so far was this regulation carried that the government appointed persons whose duty was to supervise what was intended for publication, and for one to publish a book or even a paper without first obtaining the consent of such officers—censors, as they were called—was a crime.³³ This supervision continued until after the Revolution of 1688, though the check which it received during that struggle so influenced public sentiment that Parliament refused to grant another renewal of the right, and consequently the freedom of the press began in England in 1694. But what was then recognized as freedom of the press was far short of what the English-speaking world of today means, by that term. The business of the government was carried on in the most secret manner, and little if any information was given the public concerning it. Parliament sat with closed doors, and without authorizing the publication of its proceedings.

In 1641 a member of Parliament, Sir Edward Deering, published a volume of speeches which he had delivered as a member of that body. For this he was expelled and imprisoned in the Tower, and the book was burned by the hangman.³⁴

Six years after, the House of Commons arraigned for reprimand the editor of the "Gentleman's Magazine," but discharged him on his expressing contrition.³⁵

The debates of Parliament were not published till the

³³ De Lolme's Constitutional History of England, 259.

³⁴ May's Constitutional History, vol. 1, 390.

³⁵ Cooley's Const. Limitations, 600.

Revolution of the American Colonies. The Colonists when they came to New England brought with them the idea of repression and followed for a time the precedent of the mother country. In 1662 the General Court of Massachusetts appointed two persons to be licensors of the press, and prohibited the publishing of any books or papers which should not be supervised by them.³⁶ Even the laws of Massachusetts were not published until 1649, and then it was against the earnest protests of the officials. In 1682 the laws of Virginia were published by John Buckner. For this the printer was arrested and held under bond until the pleasure of the King could be learned and the King forbade the laws to be published again.³⁷

In 1671 Governor Berkley of Virginia said, "He thanked God that there are no free schools for printing: and hoped they should not have, these hundred years: For learning hath brought disobedience and heresy and sects into the world and printing hath divulged them and libels against the best government. God keep us from both." Twelve years later Governor Dongan was sent as Colonial Governor of New York and like Governor Effingham of Virginia was told to allow no printing. It was not until 1719 that free printing was had in Massachusetts.^{37a}

When the Constitutional Convention met it sat with closed doors and secrecy was strictly enjoined on its members. After the government of the United States was established the Senate refused to open its doors for some years, and but little was known of its real work.

The first copy of a newspaper published in England, was the "Weekly Newes," on May 23, 1622.³⁸ The first daily paper published in England was in 1709, called "The Daily Courant."³⁹

"Liberty of opinion," says May, "is the greatest of all liberties."⁴⁰

³⁶ Hutchison's *Massachusetts*, 3d ed., vol. 1, 236.

³⁷ Hildreth's *History of United States*, vol. 1, 561.

^{37a} 4 *Harvard Law Review*, 379.

³⁸ May's *Constitutional History*, vol. 2, 104.

³⁹ May's *Constitutional History*, vol. 2, 106, *nota*.

⁴⁰ May's *Constitutional History*, vol. 2, 102.

Freedom of speech, or of the press, is the right to speak, write or publish, what one chooses, so long as he does not violate a law, or injure some one's character, reputation, or business, or does not violate public morality. One of the sources of this clause is the law of England. A writer on the English Constitution says this concerning the liberty of the press:

"In what, then, does this liberty of the press precisely consist? Is it a liberty left to every one to publish anything that comes into his head? to calumniate, to blacken, whomsoever he pleases? No; the same laws that protect the person and the property of the individual, do also protect his reputation; and they decree against libels, when really so, punishments of much the same kind as are established in other countries. But, on the other hand, they do not allow, as in other states, that a man should be deemed guilty of a crime for merely publishing something in print; and they appoint a punishment only against him who has printed things that are in their nature criminal, and who is declared guilty of so doing by twelve of his equals, appointed to determine upon his case, with the precautions we have before described. The liberty of the press, as established in England, consists therefore (to define it more precisely), in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must, in these cases, proceed by the trial by jury."⁴¹

Before the Constitutional Convention a number of the States included in their constitutions a similar declaration, and an effort was made to insert the clause in the original Constitution, but it failed. Mr. Pinckney's plan provided, "The Legislature shall pass no law abridging the liberty of the press."⁴² Later in the Convention he submitted a resolution to that body that "The liberty of the press shall be inviolably preserved,"⁴³ and in his celebrated speech in the Convention explaining his plan for a Constitution he said, "Freedom of the press

⁴¹ De Lolme on the Constitution of England, 287-288, ed. 1821.

⁴² Journal, 69.

⁴³ Journal, 559.

is essential to free government.”⁴⁴ The subject, however, did not receive the attention of the Convention, and was wholly omitted from the Constitution.

The language of this clause recognizes freedom of speech and of the press as pre-existing rights, and forbids Congress passing any law which shall abridge them. The principle is so universal that there is probably not a State in the Union whose constitution does not contain a similar clause. The decisions, construing this provision are more numerous in State than in Federal courts. Freedom of speech and of the press have so long attracted the attention of publicists and writers upon legal and constitutional questions, and been so frequently passed upon by the courts both in Europe and in this country, that the principles governing them are well determined.

In England the law is stated in an opinion by Mr. Justice Best as follows:

“My opinion of the liberty of the press is, that every man ought to be permitted to instruct his fellow-subjects; that every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country; that he may point out errors in the measures of public men, but he must not impute criminal conduct to them. The liberty of the press cannot be carried to this extent without violating another equally sacred right, namely, the right of character. This right can only be attacked in a court of justice, where the party attacked has a fair opportunity of defending himself. Where vituperation begins, the liberty of the press ends.”⁴⁵

As to what constitutes liberty of speech and of the press, perhaps little can be added to the opinion expressed by an eminent writer and authority.⁴⁶

“The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity,

⁴⁴ Moore's American Eloquence, vol. 1, 369.

⁴⁵ The King v. Burdett, 4 Barn. & Ald. R. 95, 132.

⁴⁶ Cooley, Constitutional Limitations, 604, 605.

or scandalous character, may be a public offence, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted."

Excluding certain matter from the mail.—That this clause prevents Congress from abridging freedom of speech or of the press, does not prevent that body from prohibiting obscene or lewd matter from being sent through the mails. In *ex parte Jackson*,⁴⁷ it was held:

"In excluding various articles from the mail, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals."

Chief Justice Fuller affirmed this doctrine in the case of *In re Rapier*,⁴⁸ where he said:

"In excluding various articles from the mails, the object of Congress is not to interfere with the freedom of the press or with any other rights of the people, but to refuse the facilities for the distribution of matter deemed injurious to the public morals."

Freedom of speech.—Freedom of speech is not abridged by prohibiting addresses in public parks;⁴⁹ nor by prohibiting profane language in certain places;⁵⁰ nor by punishing those who incite employees of a railroad operated by a receiver to leave their employment in pursuance of an unlawful combination to prevent the operation of the road.⁵¹

⁴⁷ 96 U. S., 727, 736.

⁴⁸ 143 U. S., 110, 133. *Horner v. United States*, 143 U. S., 207, 213.

⁴⁹ *Commonwealth v. Davis*, 162 Mass., 510.

⁵⁰ *State v. Warren*, 113 N. C., 685.

⁵¹ *Thomas v. Cincinnati*, 62 Fed. Rep., 804.

Freedom of the press.—Freedom of the press is not abridged by a contract not to publish a newspaper within certain prescribed territory.⁵²

In *United States v. Turner et al.*,⁵³ it was claimed that an act to regulate the immigration of aliens into the United States, which prohibited the entry into the United States of persons generally known as Anarchists, was an abridgment of their rights under this amendment, but it was held otherwise. Chief Justice Fuller, in his opinion, said (p. 292):

"We are at a loss to understand in what way the act is obnoxious to this objection. It does not abridge the freedom of speech or of the press. It is of course true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law. To appeal to the Constitution is to concede that this is a land governed by that supreme law, and as under it the power to exclude has been determined to exist, those who are excluded cannot assert the rights in general obtaining in a land to which they do not belong as citizens or otherwise. . . . We are not to be understood as depreciating the vital importance of freedom of speech and of the press, or as suggesting limitations on the spirit of liberty in itself unconquerable. The flaming brand which guards the realm where no human government is needed still bars the entrance; and as long as human governments endure they cannot be denied the power of self preservation."

The term "freedom of the press" has its just limitations and bounds and in the exercise of his rights under this amendment a person will not be permitted to violate the rights of society, or infringe upon the rights of others. The following illustrations will suffice to establish this principle: One who grossly and inaccurately reports the proceedings of a court cannot defend himself against punishment therefor on the ground that

⁵² *Cowan v. Fairbrother*, 118 N. C., 417, 418.

⁵³ 194 U. S., 279.

such a course would be an abridgment of the freedom of the press.⁵⁴

So the freedom of speech and of the press guaranteed by this amendment does not permit the publication of libels, blasphemous, or indecent articles, or other publications injurious to the public morals, or to private reputation.⁵⁵ Nor does the liberty of the press include the right to publish libels nor the right to be indemnified against the just legal consequences of such publications.⁵⁶

Congress shall make no law abridging the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Public meetings became influential in England about 1770, and public resolutions and petitions about the year 1780, and soon exerted a powerful influence on Parliament.⁵⁷

The right conferred upon the people by the Constitution does not mean that the government or the States have surrendered their right to control as-

⁵⁴ *State v. Faulds*, 17 Montana, 140.

⁵⁵ *Robertson v. Baldwin*, 165 U. S., 281.

⁵⁶ *Arnold v. Clifford*, 2 Sumner, 239.

The Constitutions of the following States at the time of the adoption of the Constitution contained provisions relative to freedom of speech and of the press:

New Hampshire: The Constitution of 1784 provided, the liberty of the press is essential to the security of freedom in a State; it ought, therefore, to be inviolably preserved.

North Carolina: Constitution of 1776, that the freedom of the press is one of the greatest bulwarks of liberty, and, therefore, ought never to be restrained. That the liberty of the press be inviolably preserved.

Georgia: Freedom of the press to remain inviolate.

Maryland: That the liberty of the press ought to be inviolably preserved.

Massachusetts: The liberty of the press is essential to the security of freedom in a State; it ought not, therefore, to be restrained in this commonwealth.

Pennsylvania: Constitution of 1776, that the people have a right to the freedom of speech, and of writing and publishing their sentiments; therefore the freedom of the press ought not to be restrained.

Virginia: That the freedom of the press is one of the great bulwarks of liberty, and can never be restrained but by despotic governments. Bill of Rights of 1776. Poore's Charters.

⁵⁷ May's Constitutional History, vol. 2, 126.

semblages of people in the interest of good order and the peace of society. What is secured is the right of the people, first, to assemble *peaceably*, and second, to *petition* the government for a redress of grievances. The clause does not provide what officer of the government shall be petitioned, but simply says the government, neither does it commit the government in any way to grant the petition nor does it say how the government should be petitioned. All that the clause does, as stated by a writer on the Constitution, is "to protect the petitioners in their right to get up the petition, circulate it for signatures and have it presented."⁵⁸

The right of the people peaceably to assemble for lawful purposes and petition their government was recognized long before the adoption of the Constitution. The regulation of such a privilege is largely under the control of the state governments. The amendment under consideration protects the people in their "right to assemble and petition the government for redress of grievances" by prohibiting Congress from passing a law abridging this right.

In *United States v. Cruikshank*,⁵⁹ Waite, Chief Justice, said (p. 552): "This amendment was not intended to limit the powers of State Governments in respect to their own citizens, but to operate upon the National Government alone. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in this enjoyment, the people must look to the States. The power for that purpose was originally placed there, and has never been surrendered to the United States. The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the National Government, is an attribute of national citizenship, and, as such, under the protection of, and guaranteed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation

⁵⁸ 2 Tucker on the Constitution, 671.

⁵⁹ 92 U. S., 542.

in respect to public affairs and to petition for a redress of grievances."

It has been judicially established that "among the rights and privileges, which have been recognized as being secured to the citizens of the United States by the Constitution, is the right to petition Congress for a redress of grievances."⁶⁰

⁶⁰In *re Quarles*, 158 U. S., 532-535.

Provisions concerning the right of petition were in the following State Constitutions when the federal Constitution was adopted:

Maryland: Every man hath a right to petition the legislature, for the redress of grievances, in a peaceable and orderly manner.

Massachusetts: Constitution of 1780. The people have a right, in an orderly and peaceable manner, to assemble to consult upon the common good; give instructions to their representatives, and request of the legislative body, by way of addresses, petitions, or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

New Hampshire: Constitution of 1784. The people have a right, in an orderly and peaceable manner, to assemble and consult upon the common good, give instructions to their representatives; and request of the legislative body, by way of petition or remonstrances, redress of the wrongs done them, and of the grievances they suffer.

North Carolina: That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the Legislature, for a redress of grievances.

Pennsylvania: Constitution of 1776. That the people have a right to assemble together, to consult for their common good, to instruct their representatives, and to apply to the legislature for redress of grievances, by address, petition, or remonstrance. Poore's Charters and Constitutions.

CHAPTER LII.

SECOND, THIRD AND FOURTH AMENDMENTS.

SECOND AMENDMENT.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Madison's form of this amendment read: "The right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country; but no person religiously scrupulous of bearing arms shall be compelled to render military service in person."¹ It was changed by the Committee of Eleven to read: "A well regulated militia, composed of the body of the people, being the best security of a free state, the right of the people to keep and bear arms shall not be infringed; but no person religiously scrupulous shall be compelled to bear arms."²

There was considerable debate on the subject in the House of Representatives and the select Committee of Three reported the article substantially as it had been reported by the Committee of Eleven, but it was subsequently changed by Congress to read as now found in the Constitution.

The Constitution of Maryland in force at the time of the adoption of the Federal Constitution provided that, "A well regulated militia is the proper and natural defense of a free government."³

The Constitution of Virginia which was then in force contained the following provision on the same subject:

"A well regulated militia, composed of the body of the

¹ 1 Annals, 451.

² Thorpe's Constitutional History of U. S., vol. 2, 225.

³ Poor's Charters, vol. 1, 819.

people trained to arms, is the proper, natural and safe defense of a free State.”⁴

No doubt these provisions influenced the adoption of this amendment.

It was held in *United States v. Cruikshank*⁵ (p. 553) that: “The right of the people to keep and bear arms is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The Second Amendment declares that this right shall not be infringed, but this means no more than that it shall not be infringed by Congress. This amendment is one of those that has no other effect than to restrict the powers of the National Government, and not those of the States.”

The statutes of Illinois provided that all able-bodied male citizens of that State between certain ages, except certain exemptions, should be subject to military duty, and be enrolled and designated as the State Militia, and that it should not be lawful for any body of men other than such State Militia, and the troops of the United States, to associate themselves together as a military company or organization, or drill or parade with arms in any city, etc., without the license of the Governor of the State, etc. One Pressner was arrested for violating this statute. It was claimed in *Pressner v. Illinois*,⁶ that the act of Illinois violated the second amendment to the Constitution of the United States, but the court held (p. 265), that the amendment in question had no other effect than to restrict the powers of the National Government, and that it did not interfere with the power of the States. It was further held (p. 267):

“The right voluntarily to associate together as a military company or organization, or to drill or parade with arms, without, and independent of, an act of Congress or law of the State authorizing the same, is not an attribute of national citizenship. Military organization and military drill and parade under arms are subjects especially under the control of the government of every country. They cannot be claimed as a right independent

⁴ Poore's Charters, vol. 2, 1909.

⁵ 92 U. S., 542.

⁶ 116 U. S., 252, 265.

of law. Under our political system they are subject to the regulation and control of the State and Federal governments, acting in due regard to their respective prerogatives and powers. The Constitution and laws of the United States will be searched in vain for any support to the view that these rights are privileges and immunities of citizens of the United States independent of some specific legislation on the subject.

"It cannot be successfully questioned that the State governments, unless restrained by their own Constitutions, have the power to regulate or prohibit associations and meetings of the people, except in the case of peaceable assemblies to perform the duties or exercise the privileges of citizens of the United States; and have also the power to control and regulate the organization, drilling, and parading of military bodies and associations, except when such bodies or associations are authorized by the militia laws of the United States. The exercise of this power by the States is necessary to the public peace, safety and good order. To deny the power would be to deny the right of the State to disperse assemblages organized for sedition and treason, and the right to suppress armed mobs bent on riot and rapine."

The Justices of the Supreme Court of Massachusetts, in a letter to the Governor of that State,[†] in construing this amendment held:

"This provision declares a great general right, leaving it for other more specific constitutional provision or to legislation to provide for the preservation and practical security of such right, and for influencing and governing the judgment and conscience of all legislators and magistrates, who are thus required to recognize and respect such rights."

Meaning of "Arms," in this clause.—In *England v. State*,[‡] the court said:

"Arms of what kind? Certainly such as are useful and proper to armed militia. The deadly weapons spoken of in the State statutes are pistols, dirks, etc. Can it be understood that these were contemplated by the framers of our Bill of Rights? . . . To refer the deadly de-

[†] 14 Gray, 620.

[‡] 35 Tex., 473.

vices and instruments called in the statute 'deadly weapons,' to the proper or necessary arms of a 'well-regulated militia' is simply ridiculous. No kind of travesty, however subtle or ingenious, could so misconstrue this provision of the Constitution of the United States as to make it cover and protect that pernicious vice from which so many murders, assassinations, and deadly assaults have sprung, and which it was doubtless the intention of the Legislature to punish and prohibit. The word 'arms' in the connection we find it in the Constitution of the United States, refers to the arms of a militiaman or soldier, and the word is used in its military sense."

In *State v. Workman*,⁹ the Supreme Court of West Virginia held:

"The second amendment of our Federal Constitution should be construed with reference to the provisions of the common law upon this subject as they then existed, and in consonance with the reason and spirit of the amendment itself, as defined in what may be called its 'preamble.' As early as the second year of Edward III., a statute was passed prohibiting all persons, whatever their condition, 'to go or ride armed by night or by day.' And so also at common law the 'going around with unusual and dangerous weapons to the terror of the people' was a criminal offence.

"The keeping and bearing of arms, therefore, which at the date of the amendment was intended to be protected as a popular right, was not such as the common law condemned, but was such a keeping and bearing as the public liberty and its preservation commended as lawful, and worthy of protection. So, also, in regard to the kind of arms referred to in the amendment, it must be held to refer to the weapons of warfare to be used by the militia, such as swords, guns, rifles, and muskets—arms to be used in defending the State and civil liberty—and not to pistols, etc."

In *Robertson v. Baldwin*,¹⁰ the Supreme Court of the United States held that an act which prohibits the carrying of concealed weapons does not violate this amendment.

⁹ 35 West Va., 367, 372.

¹⁰ 165 U. S., 275, 282, 283.

THIRD AMENDMENT.

No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

The Petition of Right exhibited to Charles I on June 2, 1628, by the Lords and Commons of Parliament, among other grievances, set forth the following:

"Whereas of late, great Companies of Soldiers and Mariners have been dispersed into divers Counties of the Realm, and the Inhabitants, against their Wills, have been compelled to receive them into their Houses, and there to suffer them to sojourn, against the Laws and Customs of this Realm, and to the great Grievance and Vexation of the People."¹¹

In this grievance is found the origin of this amendment. When the amendment was before the House of Representatives Mr. Sumpter spoke against it and said he hoped soldiers would never be quartered on the inhabitants, either in time of peace or war, without the consent of the owner, and it was a burthen, and very oppressive, even in cases where the owner gave his consent; but where this was wanting it would be a hardship indeed, and their property would lie at the mercy of men irritated by a refusal, and well disposed to destroy the peace of the family.¹²

Mr. Gerry then moved to insert in the last line between the word "but" and the words "in a manner" the words "by a civil magistrate," so that the amendment would read: "No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but by a civil magistrate in a manner to be prescribed by law," the object being to give the civil authorities control of quartering soldiers in any man's house, even in time of war, but this amendment was lost.¹³

¹¹ 2 Cobbett's Parliamentary History, vol. 8, 148, ed. 1751.

¹² Congressional Register, 2nd Lloyd, 223.

¹³ Congressional Register, 2nd Lloyd, 223, 224.

An able commentator on the Constitution has said that this amendment must be construed to be a law of the United States when war is general, or of the State when in the authorized exercise of the right of self-defense on the sudden emergencies adverted to in the Constitution, immediate State operations have become necessary. In the former case, the sole conduct of the war is given to the General Government, and it ought not to be depended on, or controlled by the State governments in its modes of proceedings. In the latter, the State, relying on its own emergencies, is entitled to the benefit of the same principle.¹⁴ The term "soldier," as here used, includes the militia of a State or government when in service the same as it does a soldier of the regular army.

The object was to preserve to every man the privacy and seclusion of his own home. Under no circumstances was this principle to be violated by the quartering of soldiers in any man's home without his consent in time of peace, nor even in time of war, unless in a manner under the supervision and direction of the law.

This amendment was also a part of Madison's first amendment.¹⁵ Its present form differs but little from that in which he introduced it. There was a short debate on it in the House of Representatives and Mr. Sumpter moved to strike out so that the amendment would read: "No soldier shall be quartered in any house without the consent of the owner," but this motion was lost.¹⁶

This amendment expressly forbids quartering a soldier in any house in time of peace, except by consent of the owner. It then provides that in time of war a soldier may be quartered in a house in a manner prescribed by law. So in time of peace, the owner of the house determines whether a soldier shall be quartered there, but in time of war, the whole matter is left to the discretion of Congress without consulting the owner.

¹⁴ Rawle on the Constitution, 127.

¹⁵ 1 Annals, 451.

¹⁶ 1 Annals, 781.

FOURTH AMENDMENT.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This great amendment was the seventh subdivision of Madison's first amendment. As introduced by him it read: "The rights of the people to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized."¹⁷

In the House of Representatives the first part of the article was amended on motion of Mr. Gerry to read: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable seizures and searches."¹⁸

Some slight variations were afterwards made by the select Committee of Three, which were approved by Congress.¹⁹

This is one of the most important amendments to the Constitution. It recognizes the right of the people to be secure in their persons and houses, and in the possession of their effects from unreasonable searches and seizures. The right is not created by the clause. It existed as a common-law right before the amendment was adopted, or before the Constitution was framed.

The origin of this amendment runs back in English history to the 17th century, when Charles II was placed on the throne. It had become the practice in the office of the secretaries to the Crown, after the Restoration,

¹⁷ 1 Annals, 452.

¹⁸ 1 Annals, 783.

¹⁹ Thorpe's Constitutional History United States. vol. 2, 257.

to issue warrants for the arrest of persons without inserting their names in the warrants, especially authors, printers and publishers of obscene and seditious libels,²⁰ and to invade the homes and search for private papers of individuals to obtain evidence against them on imaginary charges. This practice continued until the latter part of the 18th century, when the validity of such warrants was contested, and it was held by the Court of King's Bench in *Money v. Leach*,²¹ that the warrant must be issued upon the oath of an accuser, setting forth the name of the offender, the time, place and nature of the offense with a reasonable degree of certainty.

While officers of the crown were issuing and serving such warrants in England they were doing the same in the American colonies,—and this contributed much to that public sentiment which eventually demanded the adoption of this amendment. So oppressive had become the practice that here, as in England, it caused great alarm among the people, and here, as there, resistance was made to such writs on the ground of their illegality. These warrants were principally issued and the seizures made in the colony of Massachusetts. The trial which tested their legality occurred in Boston in February, 1761. It proved to be more than a mere trial, as we shall see, for the greatest question which could affect the interests of the colonists was involved. James Otis, a native of Massachusetts, was Advocate-General of the Crown at Boston, a legal position of great responsibility and honor; but he was so wrought up at the outrage which had been committed by the arrests under these warrants that he resigned his office, and, though offered a most remunerative fee if he would take charge of the defense,²² he said: "In such a cause as this I despise a fee." He then acted as one of the counsel in resisting the arrests. He spoke for five hours, and it is doubtful if any legal argument ever made on this continent produced a more profound or lasting impression. He set fire to a torch which is still burning, and which will continue to burn, for in that masterful effort he im-

²⁰ 2 Cooley's Blackstone, 290.

²¹ 3 Burrows, 1742.

²² Tudor's Life of Otis, 63.

pressed upon the American heart the great lesson of resistance to tyranny and outrage. As the result of the trial the writs were never afterwards served by judicial sanction. This trial occurred thirty years before the amendment in question was adopted, but its adoption was largely due to the opposition to the Writs of Assistance, and the powerful influence of the speech of Otis.²³

²³ The following extract from this argument shows the nature of the writs issued by the Crown officers. It is inserted here as being an instructive and interesting portion of legal colonial history, and because this speech, so often referred to, is hard to procure:

"May it please your Honours: I was desired by one of the Court to look into the books, and consider the question now before them concerning Writs of Assistance. I have accordingly considered it, and now appear not only in obedience to your order, but likewise in behalf of the inhabitants of this town, who have presented another petition, and out of regard to the liberties of the subject. And I take this opportunity to declare, that whether under a fee or not (for in such a cause as this I despise a fee), I will to my dying day oppose with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villany on the other, as this Writ of Assistance is.

"It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English lawbook. I must therefore beg your honours' patience and attention to the whole range of an argument, that may perhaps appear uncommon in many things, as well as to points of learning that are more remote and unusual; that the whole tendency of my design may the more easily be perceived, the conclusions better descend, and the force of them be better felt. I shall not think much of my pains in this cause, as I engaged in it from principle. I was solicited to argue this cause as Advocate General; and because I would not, I have been charged with desertion from my office. To this charge I can give a very sufficient answer. I renounced that office, and I argue this cause from the same principle; and I argue it with the greater pleasure, as it is in favor of British liberty, at a time when we hear the greatest monarch upon earth declaring from his throne, that he glories in the name of Briton, and that the privileges of his people are dearer to him than the most valuable prerogatives of his crown; and it is in opposition to a kind of power, the exercise of which in former periods of English history, cost one King of England his head, and another his throne. I have taken more pains in this cause, than I ever will take again, although my engaging in this and another popular cause has raised much resentment. But I think I can sincerely declare that I cheerfully submit myself to every odious name for conscience sake; and from my soul I despise all those, whose guilt, malice, or folly has made them my foes. Let the consequences be what they will, I am determined to proceed. The only principles of public conduct that are worthy of a

The search or seizure must be reasonable.—This is a purely judicial question, and in determining it the court

gentleman or a man, are to sacrifice estate, ease, health and applause, and even life, to the sacred calls of his country.

"These manly sentiments, in private life, make the good citizen; in public life, the patriot and the hero. I do not say, that when brought to the test, I shall be invincible. I pray God I may never be brought to the melancholy trial, but if ever I should, it will be then known how far I can reduce to practice, principles, which I know to be founded in truth. In the meantime I will proceed to the subject of this writ."

It appears that some of these writs had been issued, though by what authority is not stated; and the officers of the revenue were afraid to make use of them, unless they could obtain the sanction of the superior court, which had led to the application. It is impossible to devise a more outrageous and unlimited instrument of tyranny, than this proposed writ; and it can not be wondered at, that such an alarm should have been created, when it is considered to what enormous abuses such a process might have led. The following paragraph from the report of Otis' speech before cited, will serve to show what kind of instrument was here prayed for, and some results that might have been expected from it.

"Your Honours will find in the old books concerning the office of a Justice of the Peace, precedents of general warrants to search suspected houses. But in more modern books, you will find only special warrants to search such and such houses, specially named, in which the complainant has before sworn that he suspects his goods are concealed; and will find it adjudged, that special warrants only, are legal. In the same manner I rely on it, that the writ prayed for in this petition, being general, is illegal. It is a power, that places the liberty of every man in the hands of every petty officer. I say I admit that special Writs of Assistance, to search special places, may be granted to certain persons on oath; but I deny that the writ now prayed for can be granted, for I beg leave to make some observations on the writ itself, before I proceed to other acts of Parliament. In the first place, the writ is universal, being directed 'to all and singular Justices, Sheriffs, Constables, and all other officers and subjects;' so that, in short, it is directed to every subject in the King's dominions. Every one with this writ may be a tyrant in a legal manner, also may control, imprison, or murder any one within the realm. In the next place, it is perpetual, there is no return. A man is accountable to no person for his doings. Every man may reign secure in his petty tyranny, and spread terror and desolation around him, until the trumpet of the archangel shall excite different emotions in his soul. In the third place, a person with this writ, in the day time, may enter all houses, shops, etc., at will, and command all to assist him. Fourthly, by this writ, not only deputies, etc., but even their menial servants, are allowed to lord it over us. What is this but to have the curse of Canaan with a witness on us; to be the servant of servants, the most despicable of God's creation?"

"Now one of the most essential branches of English liberty is

must look at all the circumstances. In *Mason v. Rollins*,²⁴ the court remarked (p. 102):

"It may be conceded that the question whether a seizure or a search is unreasonable, in the language of the Constitution, is a judicial question; but, in determining whether a seizure is or is not unreasonable, we have to look at all of the circumstances under which it is made."

It is only against unreasonable searches and seizures that the amendment affords protection. It becomes important therefore to know what constitutes an unreasonable search or seizure.

An act of Congress authorized the Federal Courts in certain cases on motion of the government's attorney to require the defendant to produce his private books, invoices, and papers, in court, or else the averments made

the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient. This wanton exercise of this power is not a chimerical suggestion of a heated brain. I will mention some facts.

"Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware: so that, these writs are negotiable from one officer to another; and so your Honours have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this: Mr. Justice Walley had called this same Mr. Ware before him, by a constable, to answer for a breach of the Sabbath-Day acts, or that of profane swearing. As soon as he had finished, Mr. Ware asked him if he had done. He replied, Yes. Well then, said Mr. Ware, I will show you a little of my power. I command you to permit me to search your house for uncustomed goods; and went on to search the house from the garret to the cellar; and then served the constable in the same manner! But to show another absurdity in this writ, if it should be established, I insist upon it every person by the 14th Charles Second, has this power as well as the custom-house officers. The words are, 'It shall be lawful for any person or persons authorized, etc.' What a scene does this open! Every man prompted by revenge, ill humour, or wantonness to inspect the inside of his neighbour's house, may get a writ of assistance. Others will ask it from self-defense; one arbitrary exertion will provoke another, until society be involved in tumult and in blood." *Tudor's Life of James Otis*, 62-68.

²⁴ 2 Biss., 99-102.

by the District Attorney would be taken as confessed by the defendant to be true. This was held in *Boyd v. United States*²⁵ to be in conflict with the amendment under consideration. The Court declared that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, was within the scope of the fourth amendment of the Constitution in all cases in which a search or seizure would be; because it is a material ingredient and affects the sole object and purpose of search and seizure. Mr. Justice Bradley said (p. 622):

"Is a search and seizure, or, what is equivalent thereto, a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property for alleged fraud against the revenue laws, 'an *unreasonable* search and seizure' within the meaning of the Fourth Amendment of the Constitution? or, is it a legitimate proceeding?" Again (p. 624): "In order to ascertain the nature of the proceedings intended by the Fourth Amendment to the Constitution under the terms 'unreasonable searches and seizures,' it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing Writs of Assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods. These things, and the events which took place in England immediately following the argument about Writs of Assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government. Prominent and principal among these was the practice of issuing general warrants by the Secretary of State, for searching private houses for the discovery and seizure of books and papers that might be used to convict their owner of the charge of libel.

"The case, however, which will always be celebrated as being the occasion of Lord Camden's memorable discussion of the subject, was that of *Entick v. Carrington and Three Other King's Messengers*, reported at length in 19 Howell's State Trials, 1029. After describing the power

²⁵ 116 U. S., 616, 622.

claimed by the Secretary of State for issuing general search warrants, and the manner in which they were executed, Lord Camden says: 'Such is the power, and, therefore, one would naturally expect that the law to warrant it should be clear in proportion as the power is exorbitant. If it is law, it will be found in our books; if it is not to be found there, it is not law.

" 'The great end for which men entered into society was to secure their property. That right is reserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by common consent gives up that right for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action though the damage be nothing; which is proved by every declaration in trespass where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show, by way of justification, that some positive law has justified or excused him. The justification is submitted to the judges, who are to look into the books, and see if such a justification can be maintained by the text of the statute law, or by the principles of the common law. If no such excuse can be found or produced, the silence of the books is an authority, against the defendant, and the plaintiff must have judgment. According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that can not be done, it is a trespass.

" 'Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written

law that gives any magistrate such a power? I can safely answer, there is none; and, therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.

“‘But though it cannot be maintained by any direct law, yet it bears a resemblance, as was urged, to the known case of search and seizure for stolen goods. I answer that the difference is apparent. In the one I am permitted to seize my own goods, which are placed in the hands of a public officer, till the felon’s conviction shall entitle me to restitution. In the other, the party’s own property is seized before and without conviction, and he has no power to reclaim his goods, even after his innocence is declared by acquittal.

“‘The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality, 4 Inst. 176; and, therefore, if the two cases resembled each other more than they do, we have no right, without an act of Parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant, to show them to the officer, who must see that they answer the description.

“‘If it should be said that the same law which has with so much circumspection guarded the case of stolen goods from mischief, would likewise in this case protect the subject by adding proper checks; would require proofs beforehand; would call up the servant to stand by and overlook; would require him to take an exact inventory, and deliver a copy; my answer is, that all these precautions would have been long since established by law, if the power itself had been legal; and that the want of them is an undeniable argument against the legality of the thing.’

“‘Then, after showing that these general warrants for search and seizure of papers originated with the Star Chamber, and never had any advocates in Westminster

Hall except Chief Justice Scroggs and his associates, Lord Camden proceeds to add:

“ ‘Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shown, where the law forceth evidence out of the owner’s custody by process. There is no process against papers in civil causes. It has been often tried, but never prevailed. Nay, where the adversary has by force or fraud got possession of your own proper evidence, there is no way to get it back but by action. In the criminal law such a proceeding was never heard of; and yet there are some crimes, such, for instance, as murder, rape, robbery, and house-breaking, to say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction. Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such a power would be more pernicious to the innocent than useful to the public, I will not say. It is very certain that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem, that search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty.’ ”

“After a few further observations, his Lordship concluded thus: ‘I have now taken notice of everything that has been urged upon the present point; and upon the whole we are all of opinion, that the warrant to seize and carry away the party’s papers in the case of a seditious libel, is illegal and void.’ ”

“The principles laid down in this opinion,” said Justice Bradley (p. 630), “affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions on the part of the government and its employes of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that

right has never been forfeited by his conviction of some public offense,—it is the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

"Can we doubt that when the Fourth and Fifth Amendment to the Constitution of the United States was penned and adopted, the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures? Could the men who proposed these amendments in the light of Lord Camden's opinion, have put their hands to a law like that of March 3, 1863, and March 2, 1867, before recited? It seems to us that the question cannot admit of a doubt. They never would have approved of them. The struggles against arbitrary power in which they had been engaged for more than twenty years, would have been too deeply engraved in their memories to have allowed them to approve of such insidious disguises of the old grievance which they had so deeply abhorred."

The conclusion that the court reached on this point was, that it did not require an actual entry upon one's premises or that they should be searched and papers seized, in order to constitute an unreasonable search and seizure within the meaning of the Fourth Amendment, and that a compulsory production of private papers, etc., to be used against a party in a criminal proceeding is prohibited by the spirit of this amendment.

The provisions of this amendment as to search and seizure do not prevent the Court from issuing a *subpoena duces tecum*; nor can a corporation refuse to produce papers or answer incriminating questions under it.

The distinction between a corporation and a person as to their respective rights is this:

A corporation is created by the State presumably for the benefit of the public. The powers conferred upon it

are limited by the law. It cannot make a contract which the law does not authorize. There is a right reserved to the legislature to investigate contracts of a corporation and ascertain whether it has exceeded its powers. For these reasons a corporation cannot claim an immunity from producing its papers or books, or answering incriminating questions which an individual might claim under this amendment. He can conduct his business in his own way without being bound to answer questions which would incriminate him. Receiving but little protection from the State, he is under but little obligation to it.²⁶

Nor does a seizure of goods by a marshal in the execution of an ordinary process in the usual way violate the provisions of the amendment.²⁷

What amounts to an unreasonable search?—A compulsory production of private papers to be used in evidence against the owner is an unreasonable search and seizure within this amendment.²⁸

Also an actual entry on the premises is not necessary to constitute seizure. An actual entry on the premises and seizure of books and papers is not necessary to make an unreasonable search within this clause. It is sufficient if a party is compelled to produce papers and books for use against him in a criminal proceeding, or for a forfeiture.

The warrant.—The warrant is the officer's authority for making the search. This cannot be issued until there is filed with the judicial officer an affidavit or affirmation setting forth that of affiant's own knowledge the facts make out a case of probable cause.

In *United States v. Tureaud*,²⁹ the affidavit was in the following form (p. 622):

"George A. Dice, being duly sworn, says: All the statements and averments in the foregoing information are true, as he verily believes.

"Sworn to and subscribed before me this 20th day of May, 1884.

"E. R. Hunt, U. S. Commissioner."

²⁶ *Hale v. Henkel*, 201 U. S., 43-74.

²⁷ *American Tobacco Co. v. Werckmeister*, 207 U. S., 284-302.

²⁸ *Boyd v. United States*, 116 U. S., 616.

²⁹ 20 Fed. Rep., 621.

After going generally into the subject of the sufficiency of affidavits, Billings, D. J., held this affidavit insufficient and said (p. 624): "It does not appear, from the affidavit upon which these procedures are based, that the affiant has any knowledge whatever of the truth of the matters contained in the informations; but simply that 'all the statements and averments are true as he verily believes;' i. e., that he believes them all to be true, without any showing as to the grounds of his belief. The constitutional provision must be utterly disregarded, or else it must be held that there is here no probable cause supported by the necessary proof."

In *Territory v. Cutinola*,³⁰ it was held that an information filed by a United States District Attorney in his official capacity is sufficient to authorize the issuance of a warrant for search and seizure, without being supported by an affidavit, and that such an issuance does not violate the fourth amendment to the Constitution of the United States.

This decision criticises the decision in *United States v. Tureaud*, above cited, and says, "Except that part of it which holds an affidavit upon belief insufficient, the decision is a mere dictum of the judge, and cannot be regarded as authority" (p. 316).

What is probable cause?—In *United States v. Tureaud* (above cited), it was held: The probable cause supported by oath or affirmation, prescribed by the fundamental law of the United States, is the oaths or affidavits of persons who, of their own knowledge, depose to the facts which constitute the offense.

Mr. Justice Bradley held:³¹ "The probable cause referred to, and which must be supported by oath or affirmation, and upon which alone a warrant can issue, must be submitted to the committing magistrate himself, and not merely to an official accuser, so that the magistrate may exercise his judgment on the sufficiency of the ground for believing the accused person guilty; and this ground must amount to a probable cause of belief or suspicion of the accused person's guilt."

Letters and packages.—Congress cannot authorize the

³⁰ 4 New Mexico, 305-316.

³¹ 3 Woods, 502.

opening of letters and sealed packages under this clause; nor will the order of the Postmaster General issued without warrant justify the seizure by a postmaster of letters and sealed packages.³² In *Ex parte Jackson*³³ it was held: "Letters and sealed packages in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened, and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when the papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment to the Constitution."

When the production of books and papers violates the clause.—In *Boyd v. United States*,³⁴ it was held:

"An act of Congress which requires a party to produce his private books and papers, and if he refuses to do so upon demand, permits the Government to assume as true its allegations as to the contents of said books and papers, is unconstitutional as being in conflict with the fourth amendment."

When it does not.—In *United States v. Three Tons of Coal*,³⁵ the court said: "It is no infringement upon the personal or constitutional rights of distillers to require that books and papers used and kept by them in their business shall be produced for inspection by the attorneys for the Government. Such books and papers are not such private property as exempts them from search and seizure, nor are they protected by the rules against obtaining them

³² *Hoover v. McChesney*, 81 Fed. Rep., 472-483.

³³ 96 U. S. 727, 733.

³⁴ 116 U. S., 616.

³⁵ 6 Biss., 379.

to be used as evidence." This decision seems to be based upon the ground that the Government really had an interest in such business as affects the public revenues.

What charges are not sufficient to justify arrest.—A communication of the British minister charging that a master of an American vessel had murdered a British subject on the high seas, together with copies of depositions taken before a justice of the peace of the Island of Antigua, is not sufficient evidence to authorize the President to order the arrest of the accused and confinement for trial.³⁶ But had the original papers been produced and the official character of the magistrate before whom they were taken been certified by the Governor of the island on which the murder occurred, it would have been sufficient.³⁷

The President cannot order an arrest by proclamation or instructions to marshals. Such proclamation or instructions would in effect be a warrant to arrest and either of them would be a violation of the fourth article of amendment to the Constitution.³⁸

But the President may issue the order for arrest for one who has escaped after being regularly arrested, because the regularity of the arrest implies that the probable cause has been furnished on oath or affidavit, and that the warrant was duly issued.³⁹

When a proper case is made out a warrant may issue to search the *person* of an individual as well as his dwelling place.⁴⁰

A person cannot be arrested as being a suspicious person.—It was held in *Stoutenburgh v. Frazier*,⁴¹ that an act of Congress declaring that "all suspicious persons" might be arrested and prosecuted as criminals, and, upon conviction, be fined and imprisoned, violated the fourth amendment to the Constitution. In this case Alvey, C. J., distinguishes between a *suspicious character* and a *suspicious person*.

In *Murray's Lessee v. Hoboken Land Co.*,⁴² it was de-

³⁶ 2 Opinions of Att'y Gen., 266.

³⁷ *Ibid.*

³⁸ 1 Opinions of Attorneys General, 230.

³⁹ *Ibid.*, 230.

⁴⁰ *Collins v. Lane*, 68 Cal., 288.

⁴¹ 16 D. C. App. Cases, 229.

⁴² 18 Howard, 272.

cided (p. 285): The fourth article of amendment to the Constitution has no reference to civil proceedings for the recovery of debts, of which a search warrant is not made part.

How far may congressional committees invade the private affairs of citizens?—In *In re Chapman*,⁴³ this question was considered and the court said: Questions which did not seek to ascertain any facts as to the conduct, methods, extent, or details of the business of the firm in question, but only whether a firm, confessedly engaged in buying and selling stocks, and the particular stock named, was employed by any Senator to buy or sell for him any of their stock, whose market price might be affected by the Senate's action, were competent. These questions cannot be regarded as amounting to an unreasonable search into the private affairs of the witness simply because he may have been connected with the alleged transaction, and the power to ask such questions is within the constitutional power of legislative committees.

Testimony taken by the Interstate Commerce Commission.—In *Interstate Commerce Commission v. Baird*⁴⁴ it was held:

"The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation, and should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof."

In this case it appeared that certain coal companies which had organized to construct an independent line to the ocean subsequently made contracts with certain railroads for the purchase of collieries. This resulted in the construction of the independent line being abandoned. It was held that these contracts were competent, and their production was not an infringement of the fourth amendment.

Evidence may be used in a case though obtained in an

⁴³ 186 U. S., 661, 669.

⁴⁴ 194 U. S., 25, 44.

irregular way.—This phase of the subject was considered in *Adams v. New York*,⁴⁵ and the language of Mr. Justice Day in passing on it was:

“The contention is that, if in the search for instruments of crime, other papers are taken, the same may not be given in evidence. As an illustration, if a search warrant is issued for stolen property, and burglars’ tools be discovered and seized, they are to be excluded from testimony by force of these amendments. We think they were never intended to have that effect, but were rather designed to protect against compulsory testimony from a defendant against himself in a criminal trial, and to punish wrongful invasion of the home of the citizen or the unwarranted seizure of his papers and property.”

Aliens entitled to the benefit of this amendment.—In *United States v. Wong Quong Wong*⁴⁶ it was held:

“Aliens while in this country are entitled to the benefit of constitutional guaranty, which are not confined to citizens, as affecting liberty or property.”

It was also held that the fourth amendment was applicable to the following facts: The defendant was a Chinaman, who gave letters written in Chinese to an employe of the government, who in turn gave them to customs officials, who opened, read and kept the letters, and they were offered in evidence. The court said:

“The opening of the envelopes, and taking these letters from them, was a seizure of papers of the appellants that was unreasonable and contrary to the spirit of the fourth amendment, and such papers, procured in that way, cannot be used in evidence against persons from whom they are procured without violating the protection afforded by the amendment to all persons in this country. It has been said that the manner of obtaining such evidence, whether by force or fraud, does not affect its admissibility; but these constitutional safeguards would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use.”⁴⁷

Congress cannot deprive a person of his right of action

⁴⁵ 192 U. S., 585, 598.

⁴⁶ 94 Fed. Rep., 834.

⁴⁷ *Ibid.*, 833-834.

under this amendment.—Congress passed an act that “any order of the President, or under his authority, made at any time during the existence of the rebellion shall be a defense in all the courts to any action or prosecution, civil or criminal, for any search, seizure, arrest, or imprisonment done under color of any law of Congress,” etc. In *Griffin v. Wilcox*⁴⁸ the court held this was a violation of the amendment securing the people against unreasonable searches and seizures.

In *Territory v. Cutinola*⁴⁹ it was held (p. 316), that the fourth amendment is operative in the Territories, and is a limitation upon the legislation and courts of the Territories, as well as of the General Government.

⁴⁸ 21 Ind., 372.

⁴⁹ 4 New Mexico, 305.

CHAPTER LIII.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

No amendment submitted by Mr. Madison to the House of Representatives embraced all the provisions contained in this amendment. The first clause probably came from the first clause of his seventh amendment, which provided: "The trial of all crimes (except in cases of impeachments, and cases arising in the land and naval forces, or the militia when on actual service, in time of war or public danger)."¹

The remainder of the amendment was taken from the fifth subdivision of Mr. Madison's fourth amendment, which read: "No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offence; nor shall be compelled to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation."²

The Committee of Eleven changed it to read: "No person shall be subject, in case of impeachment, to more

¹ 1 Annals, 452.

² 1 Annals, 451, 452.

than one trial or one punishment for the same offense, nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”³

The special Committee of Three slightly changed it,⁴ and it was then altered by Congress to read as it is now found in the Constitution.

This is the greatest of the original amendments. It secures to the citizen certain rights without which society could not endure nor the State survive. It affords more protection to the individual than any amendment or any provision of the original Constitution. It affects more directly the citizen in his daily life, and provides him with greater security in his person and property, than any other provision in our organic law. It protects him from prosecution by declaring “no one shall be held to answer for a crime, except by presentment or indictment by a Grand Jury.” It protects him from continued prosecution by providing that “no one shall be twice put in jeopardy for the same offense.” It protects him from being compelled to be a witness against himself in a “criminal case.” It protects him from being “deprived of life, liberty, or property without due process of law;” and it protects his property from being “taken for public use, unless he receives just compensation for it.”

These are all fundamental rights of the citizen. Without them society would soon become chaotic and perhaps anarchistic. To secure the individual and society in these rights is a part of the office and function of this amendment. No greater rights can be secured to men than those secured by this article. The amendment is susceptible of four divisions.

First, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger.”

³ Thorpe's Constitutional History of U. S., vol. 2, 225, 226.

⁴ Thorpe's Constitutional History of U. S., vol. 2, 258.

Second, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Third, "Nor shall any person be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

Fourth, "Nor shall private property be taken for public use, without just compensation."

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.

This clause originated in the Massachusetts convention called to ratify the Constitution. Among the amendments which that convention adopted and recommended was: "That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces."⁵ As Mr. Madison introduced it in Congress with the other original amendments it read: "In all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary."⁶ It was then referred to a committee, and reported back to the House practically as it now reads.

The expression "no person" includes aliens of whatever nationality, and they cannot be deprived of the benefit of this clause.⁷ Even an alien who is here contrary to law is entitled to the benefit of this amendment.⁸

Cases where the amendment does not apply.—Persons triable in a consular court in a foreign country are not

⁵ Elliot, vol. 2, 177.

⁶ 1 Annals, 452.

⁷ Wong Wing v. United States, 163 U. S., 228, 234; Li Sing v. United States, 180 U. S., 495.

⁸ Taylor v. Carpenter, 3 Story, 458. United States v. Wong Dep Ken, 57 Fed. Rep., 206-212.

entitled to the benefit of this clause. In *In re Ross*,⁹ it was held:

"The guarantees which the Constitution affords against accusation of capital or infamous crimes except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."

Nor are the inhabitants of the Cherokee Nation entitled to the benefit of this amendment. In *Talton v. Mayes*,¹⁰ it was said:

"The crime of murder committed by one Cherokee Indian upon the person of another within the jurisdiction of that nation is clearly not an offense against the United States, but an offense against the local laws of the Cherokee Nation, and necessarily the statutes of the United States which provide for an indictment by a grand jury, etc., have no application in such a case, for such statutes relate only, if not otherwise specially provided, to grand juries empanelled for the courts of and under the laws of the United States. . . . As the powers of local self-government enjoyed by the Cherokee Nation existed prior to the Constitution, they are not operated upon by the fifth amendment, which had for its sole object to control the powers conferred by the Constitution on the National Government."

The amendment did not apply to Hawaii during the period of its transition from the Republic of Hawaii to a territory of the United States. By joint resolution of Congress, passed July 7, 1898, the Hawaiian Islands were annexed "as a part of the territory of the United States, and subject to the sovereign dominion thereof," with the following condition: "the municipal legislation of the islands not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution. . . . contrary to the Constitution of the United States," etc.

In 1899 a prisoner was tried upon an indictment accord-

⁹ 140 U. S., 453, 464. *Cook v. United States*, 138 U. S., 157, 181.

¹⁰ 163 U. S., 376, 381, 382.

ing to the usual course of procedure in the Republic of Hawaii, which permitted a person to be tried without an indictment by a grand jury, and permitted a conviction by nine members of the jury of twelve. The prisoner was convicted and sentenced to the penitentiary, and subsequently sought his release by writ of *habeas corpus*, claiming that he was entitled to the protection of the fifth amendment. Mr. Justice Brown, in delivering the opinion of a majority of the court in *Hawaii v. Maki-chi*,¹¹ held that it was not intended by the resolution of Congress to abolish at once the criminal procedure theretofore in force in the islands of Hawaii, and to substitute immediately, and without legislation, the common-law proceedings by grand and petit juries, and that the conviction being August 12, 1898, and June 4, 1900, in accordance with the legislation at the time of the annexation was legal, although it did not give the defendant the benefit of the fifth amendment to the Constitution.

What is a capital or otherwise infamous crime?—A capital crime is an offense punishable by death. An infamous crime is one punishable by imprisonment at hard labor. In *Mackin et al. v. United States*,¹² the defendants were indicted for offenses punishable by fine and imprisonment. It was held that the crimes charged against the defendants were infamous crimes within the meaning of the fifth amendment to the Constitution.

In *United States v. De Walt*,¹³ it was held that imprisonment in a State prison or penitentiary, with or without hard labor, is an infamous punishment; also that a crime punishable by imprisonment for a term of years at hard labor is an infamous crime within the meaning of the Fifth Amendment.¹⁴

Unless on presentment or indictment of a Grand Jury.—In *ex parte M'Clusky*,¹⁵ the Judge said:

"Has any person the right to surrender his liberty in violation of a fundamental right, secured to him for the protection of the liberty of such person by the Fifth

¹¹ 190 U. S., 197, 213.

¹² 117 U. S., 348. *Parkinson v. United States*, 121 U. S., 281.

¹³ 128 U. S., 393, 394.

¹⁴ *Ex parte Wilson*, 114 U. S., 417, 429.

¹⁵ 40 Fed. Rep., 71, 74, 76.

Amendment? A party cannot waive a constitutional right when its effect is to give the court jurisdiction. The liberty of the citizen is a donation of the Great Creator, and cannot be taken by persons upon their own authority, even with the consent of the citizen whose liberty is taken; but it must be taken by due process of law. None of the fundamental requisites to the preceding, which makes up due process of law, can be so waived as to deprive the person whose liberty is taken from him of afterwards resorting to legal means to obtain his liberty."

Except in cases arising in the land or naval forces.—The purpose of this provision was to prevent any conflict between the civil and military or naval authorities in the administration of justice. Cases arising in the military or naval departments of the government are subject to the "rules for the government and regulation of those forces which Congress is empowered to make." Courts martial are no part of the judicial system of the United States, and within their proper jurisdiction, their proceedings are not reviewable by the civil authorities.¹⁶

When in actual service in time of War or public danger.—The words, "when in actual service in time of war or public danger," have been held to apply only to the militia, and not to the army of the United States.¹⁷

Nor shall any person be subject for the same offence to be twice put in jeopardy of life and limb.

History of this Clause.—This is a very ancient maxim of the law. It was mentioned by Bracton, who wrote in the thirteenth century. The expression in the criminal law was, *non bis in idem*—no one shall be tried twice for the same offense. The corresponding expression in civil cases, which is also of great antiquity is, *nemo debet bis vexari pro una et eadem causa*—no one shall be vexed twice for one and the same cause.¹⁸ The provision was as much designed to prevent an offender from being punished twice for the same offense as from being tried twice for it.¹⁹

¹⁶ *Kintz v. Moffitt*, 115 U. S., 487, 500.

¹⁷ *Johnson v. Sayre*, 158 U. S., 109, 115.

¹⁸ *Ex parte Lange*, 18 Wall., 163, 168.

¹⁹ *Ex parte Lange*, 18 Wall., 173.

The words "life or limb" in the clause do not seem to add force or strength to it, and could well have been omitted. Long ago in England many offenses were punished by dismemberment of limbs, and that was the origin of the words in the clause, but when the Constitution was adopted loss of limb was not inflicted as a punishment in any State, and had long been abandoned in England.²⁰ Consequently there was no reason for this expression in the amendment.

The clause is one of the great safeguards of personal liberty, and is probably now found in the constitution of every State in the Union. But the nearest approach to it when the Constitution was adopted was found in the Constitution of New Hampshire of 1784, which provided, "No subject shall be liable to be tried after an acquittal for the same crime or offense." The benefit of the provision has been extended in the United States to include misdemeanors. In *ex parte Lange*,²¹ it was held:

"To every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute, a plea of *autrefois acquit* or *autrefois convict* is a good defense."

What is jeopardy?—Jeopardy is the situation of a prisoner when a trial jury is sworn and empaneled to try his case upon a valid indictment, and the jury has been charged with his deliverance. Again, jeopardy is the peril in which a prisoner is put when he is regularly charged with a crime before a tribunal properly organized and competent to try him.²²

When is a person in jeopardy?—A person is in jeopardy whenever he is put on trial before a competent court and jury under a valid indictment.²³ It is being twice put in jeopardy which the amendment forbids. The prohibition is not against being punished twice, but against being put in jeopardy twice; and the accused, whether

²⁰ *People v. Goodwin*, 18 Johnson, N. Y., 187, 200.

²¹ 18 Wall., 163, 169.

²² *United States v. Mays*, 1 Idaho, 763, 770. *Ex parte Fenton*, 77 Cal., 183, 184.

²³ *Ex parte Glenn*, 111 Fed. Rep., 261.

convicted or acquitted, is equally put in jeopardy at the first trial.²⁴

What does not amount to being twice put in jeopardy.

—It is an established rule in the Federal Courts that an acquittal of a defendant before a court which did not have jurisdiction does not amount to being twice put in jeopardy, and also it is an established rule in such courts that where a jury is discharged in criminal cases during the trial for reasons satisfactory to the judge, and the defendant is subsequently tried by another jury, he has not been twice in jeopardy. Nor can one be in jeopardy unless the court has jurisdiction of the case.

An acquittal before a court having no jurisdiction is like all the proceedings in the case, absolutely void, and, therefore, no bar to a subsequent indictment and trial in a court which has jurisdiction of the offense. Where a jury is discharged in a criminal case during the trial for reasons satisfactory to the judge, and the defendant is subsequently tried by another jury, he is not twice in jeopardy.²⁵

After a jury had been in retirement for forty hours, and had announced in open court that they were unable to agree on a verdict, and were discharged by the judge against defendant's consent, it was held to be a question to be determined by the presiding judge in the sound exercise of his discretion, and the defendant could be put on trial by another jury.²⁶

A court, without the consent of the defendant, and under exception, discharged the jury and directed another jury to be called. The defendant pleaded he had been once in jeopardy for the same offense for which he now stood charged. It was held that courts of justice are invested with the authority to discharge a jury from giving a verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated, and to order a trial by another jury; and that the defendant is not thereby twice put in jeopardy.²⁷

²⁴ *United States v. Ball*, 163 U. S., 662, 669.

²⁵ *Simmons v. United States*, 142 U. S., 148, 153.

²⁶ *Logan v. United States*, 144 U. S., 263, 297, 298.

²⁷ *Thompson v. United States*, 155 U. S., 271, 273.

In *United States v. Perez*,²⁸ the defendant was tried for a capital offense, and the jury, being unable to agree, was discharged by the court without the consent of the prisoner or the consent of the attorney for the United States. The prisoner thereupon claimed his right. The court held: "We are of opinion the facts constitute no legal bar to a future trial. The prisoner has not been convicted or acquitted, and may again be put upon his defense. We think that in all cases of this nature the law has invested courts of justice with the authority to discharge a jury from giving any verdict whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated."

*United States v. Haskell*²⁹ was a case where the jury returned a verdict of guilty upon the first count and not guilty upon the others. On being polled (p. 407) one jurymen declared after much agitation that he was not quite collected, and answered, "Not guilty." The court, being satisfied from the appearance and conduct of the juror, as well as from the declaration of many of the jurymen as to his conduct and speeches, that he was insane and unfit to act as a jurymen, made the following entry on the minutes: "The jury, having been kept together thirty-six hours, and more than twenty-four hours without refreshments, and there being no prospect of their agreeing, and the court being satisfied of the insanity of one of the jurymen, discharged the jury without the consent of the counsel for the prisoner." The jury was accordingly discharged, and at a subsequent trial, counsel for the defendant tendered a special plea, setting forth the arraignment of the prisoner's former trial, together with all the circumstances thereof, and claimed that the discharge of the jury was equivalent to an acquittal. In passing upon the question the court said (p. 407): "Is this plea to be supported in reason, and on principle? We think it is not, because we consider the authority of the court to discharge the jury, to rest in the sound discretion of the court. It can rest nowhere else." Quoting from another authority the court said (p. 410):

²⁸ 9 Wheaton, 579, 580.

²⁹ 4 Wash. C. C., 402.

"The moment it is made to appear to the court by satisfactory evidence, that the health of a single jurymen is so affected as to incapacitate him for doing his duty, the case of necessity arises which authorizes the court to discharge the jury."

In *United States v. Jim Lee et al.*,⁸⁰ the case was submitted to the jury at 1:30 p. m. The jurors were discharged by the court at 4:05 p. m. of the same day, being first asked in the presence of the defendants and their attorney if they had agreed upon a verdict, to which they replied they had not, and that it was impossible to agree; whereupon the court ordered their discharge. Subsequently an affidavit was produced showing the jury were absent from the room for one hour for luncheon, being attended by an officer of the court. It was afterwards contended by counsel for the defendants that the jurors were not given a reasonable time for deliberation, and were discharged without necessary and reasonable cause therefor, and to place the defendants upon trial again would be a violation of their rights under the fifth amendment to the Constitution. The court held that the contention was not sustained by the record, which says that such discharge was ordered by the court because of the inability of the jurors to agree upon a verdict. The discharge of the jury for such a cause was not in judgment of law equivalent to an acquittal, and when a defendant was subsequently placed upon trial before another jury for the same offense he was not thereby twice put in jeopardy within the meaning of the fifth amendment.

The court further held (p. 743): That the declarations of jurors, while not conclusive, are proper evidence for the consideration of the court in determining whether there is any reasonable probability that longer deliberation would result in a verdict. The length of time which is sufficient for proper deliberation upon the part of the jury must, from the necessity of the case, rest in the discretion of the court—a discretion to be exercised in view of all the circumstances of the particular case; and it has been held that, when the court had discharged the jury

⁸⁰ 123 Fed. Rep., 741.

for inability to agree, no exceptions to its action "can be sustained on the ground that it was sooner than it ought to have been."

So in *United States v. Van Vliet*,³¹ it was held: Where a demurrer is sustained to an information and subsequently the judgment is reversed and the demurrer overruled, the defendant may be rearrested, and this does not amount to being twice put in jeopardy.

In *United States v. Jones*,³² the defendant had been convicted and sentenced, and was serving his term, when the circuit court held the indictment void; whereupon the defendant was released from imprisonment and brought to trial a second time. He plead his former conviction. Held: That it was not a bar to another trial.

In *United States v. Shoemaker*,³³ after a jury was empaneled and witnesses sworn the Government abandoned the prosecution and entered a *nolle prosequi*. Held: The prosecuting attorney may under leave of the court, before the beginning of the trial, enter a *nolle prosequi* on a regular indictment, and such entry is no bar to a subsequent prosecution for the same offense. Held also: That where the Government abandons its case after a jury has been impaneled and witnesses are sworn, because of the insufficiency of the evidence, such conduct is equivalent to an acquittal and a bar to subsequent indictment for the same offence.

One having been tried for committing an offence in the Philippine Islands and acquitted cannot subsequently be tried for the same offense in the United States; for an acquittal anywhere within the jurisdiction of the United States is a good defence against a second trial, although this is not true where one commits an offence which is indictable both in a State and the United States. In such case an acquittal in one court does not preclude a trial in the other.³⁴ The fifth amendment operates only as a restriction upon the power of the Federal Government and not upon the States.³⁵ Nor can one be put in

³¹ 23 Fed. Rep., 35.

³² 31 Fed. Rep., 725.

³³ 2 McLean, 114.

³⁴ *Grafton v. United States*, 206 U. S., 333, 354.

³⁵ *Barrington v. Missouri*, 205 U. S., 483, 486. *Brown v. New Jersey*, 175 U. S., 172. *Howard v. Kentucky*, 200 U. S., 172.

jeopardy if the indictment under which he is tried is so radically defective that it would not support a judgment of conviction.³⁶

A defendant had been tried in the Philippine Islands for a certain offense and acquitted, but the jury convicted him of a lesser offense. He appealed from the judgment of the conviction and a new trial was granted. It was held in *Trono v. United States*,³⁷ that upon the second trial the accused could be again tried for the greater offense of which he had been acquitted and that the new trial did not violate the jeopardy clause.

So it was held in *Flemister v. United States*,³⁸ that when one was tried for an assault on an officer, after being convicted for breach of the peace upon another person at the same time and place, this did not amount to being placed twice in jeopardy within the meaning of the Philippine Bill of Rights.

One is not put in jeopardy within the provisions of this amendment simply by being arraigned and pleading to an indictment, and when a person has been twice surrendered by a State to another State it does not amount to being put twice in jeopardy because the requisition of the State to which he is sent is founded on an indictment for the same offence for which the defendant had originally been indicted but not tried.³⁹

Nor shall any person be compelled in any criminal case to be a witness against himself.

In the early centuries the Roman Law, and afterwards the common law of England, permitted the most cruel punishments to be inflicted on persons suspected of crime in order to compel them to admit their guilt. The progress of civilization and Christianity aroused opposition to this method, and about the close of the seventeenth century it was abandoned and the opposite principle was

³⁶ *Shoener v. Pennsylvania*, 207 U. S., 188, 195.

³⁷ 199 U. S., 521-530.

³⁸ 207 U. S., 372-374.

³⁹ *Bassing v. Cady*, 208 U. S., 386-392.

incorporated into the common law of England—that no one should be compelled to incriminate himself.

“This doctrine,” said Mr. Justice Brown, in *Brown v. Walker*,⁴⁰ “had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which had long obtained in the Continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists, that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.”

The provision is one of the most important safeguards contained in the amendments to the Constitution. Its omission from the original instrument is perhaps due to the fact that it had long been recognized as one of the basic principles of the common law, which as Mr. Justice Moody says, “distinguished it from all other systems of jurisprudence.”⁴¹ It would seem, however, that the fact that it had been adopted into the constitutions of North Carolina, Pennsylvania, Virginia, Massachusetts and New Hampshire at the time the Federal Constitution was framed, would have caused some recognition of the principle in that instrument. A similar provision is now included in the Constitution of each State in the Union except two, Iowa and New Jersey, where it is held to be part of the existing law.

The privilege is limited to criminal cases. It becomes, therefore, important to ascertain what a criminal case is.

⁴⁰ 161 U. S., 591, 596, 597.

⁴¹ *Twining v. New Jersey*, 211 U. S., 78, 91.

What is a criminal case?—In *United States v. Three Tons of Coal*,⁴² it was held that the words “criminal case” in the Constitution mean a case in which the punishment for crime is sought to be visited upon the person of the offender, in the ordinary course of criminal prosecution, as against proceeding *in rem* to effect a forfeiture of the thing to which the offense primarily attaches.

In *Lees v. United States*,⁴³ which was a civil action in form for the recovery of a penalty for importing an alien to perform labor in the United States in violation of an act of Congress, Lees, one of the defendants, was called as a witness. His counsel objected on the ground that the proceeding was in the nature of a criminal prosecution. The court held: “Though the action was civil in form, it was criminal in its nature, and in such a case a defendant cannot be compelled to be a witness against himself.”

The privilege extends to witnesses before a grand jury or an investigation.—In *Counselman v. Hitchcock*,⁴⁴ the court said: “It is impossible that the meaning of the constitutional provision can be, that a person shall not be compelled to be a witness against himself only in a criminal prosecution against himself. It would doubtless cover such cases, but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he had himself committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard. It is entirely consistent with this language of the Constitution that the privilege of not being a witness against himself is to be exercised in a proceeding before a grand jury.”

As a result of the decision in this case Congress passed an act, that “no person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the

⁴² 6 Bias., 379, 393.

⁴³ 150 U. S., 476, 479.

⁴⁴ 142 U. S., 547-562, 563.

subpoena of the Commission, . . . on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding."

The purpose of this act was to afford immunity to persons testifying before the Interstate Commerce Commission, since it was held in the Counselman case that Section 860 of the Revised Statutes did not give such immunity. The act of 1893 was considered by the Supreme Court in *Brown v. Walker*.⁴⁵ In the opinion of the Court it was said (p. 600): "The danger of extending the principle announced in *Counselman v. Hitchcock* is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person, who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself, under the pretext of shielding his own good name, to be made the tool of others, who are desirous of seeking shelter behind his privilege."

The Court held that the act of 1893 afforded immunity against prosecution and deprived the witnesses of their constitutional right to refuse to answer.

In *Interstate Commerce Commission v. Baird*,⁴⁶ *Brown v. Walker* was followed and certain contracts between certain competing coal companies were held competent evidence and ordered produced.

When the privilege cannot be invoked.—In *Brown v. Walker*, *supra*, the following general rules were established (pp. 579-599):

First: "If the witness elects to waive his privilege, as he

⁴⁵ 161 U. S., 591, 600.

⁴⁶ 194 U. S., 25.

may doubtless do, and discloses his criminal connections, he cannot stop, but must go on and make a full disclosure.

Second: "If a prosecution for a crime, concerning which the witness is questioned, is barred by the statute of limitations, he will be compelled to answer.

Third: "If the answer of the witness would have a tendency to disgrace him, or bring him into disrepute, the great weight of authority is that he may be compelled to answer, if the proposed evidence be material to the issue being tried, but if the answer of the witness can have no effect upon the case, except to impair his credibility he may fall back upon his privilege. Yet he is still bound to answer if his answer will not show his infamy, but only *tend* to disgrace him, or bring him into disgrace.

Fourth: "It follows from the above propositions that, if a witness has received a pardon he cannot any longer set up his privilege since he stands with respect to such offence as if it had never been committed."

Before this decision there had been considerable conflict in the cases as to whether a witness could be compelled to testify when the effect of his testimony would have a tendency to disgrace him. The principle adopted by the Supreme Court in this case settles the question and establishes the rule, that if the testimony of the witness be material to the issue to be tried he must answer, though to do so would tend to disgrace him. If his answer would have no effect on the case, but only impair his testimony, the witness can plead his privilege and need not answer, though, if in such case his answer would only *tend* to disgrace him and not directly show his infamy, he must answer.

When an act of Congress does not deprive a citizen of this right.—In *In re Nachman*,⁴⁷ it was held that no act of Congress can deprive a citizen of the privilege afforded by the Constitution, unless it supplies a complete protection from all perils against which the Constitution is intended to provide.

A witness before a grand jury declined to answer certain questions, and was taken before the court and there

⁴⁷ 114 Fed. Rep., 995, 997.

assured that no information given by him in his answers would or could be used against him in any prosecution in any Federal court. It was held that the witness could not be required to waive his constitutional privilege upon such an assurance by the court, and that he had a right to stand upon his privilege and decline to answer the questions notwithstanding such assurance.

It was held also that it is for the judge to decide, and not for the witness, whether an answer will reasonably have a tendency to incriminate the witness, or whether it will furnish an element in a chain of evidence necessary to convict him. In determining whether or not the witness is entitled to the privilege of not answering, the court may look at all the circumstances of the case.

Where a number of questions have been asked a witness and he could have answered some of them without incriminating himself, he is not bound to do so. If it is one step, said the court, to having a tendency to incriminate him he is not compelled to answer.⁴⁸

What is being a witness against oneself?—In the Matter of Moran,⁴⁹ the petitioner was compelled to stand up and walk before the jury and during recess of the court the jury was stationed so as to observe his size and walk. Whether this was compelling one to be a witness against himself was a question which the Supreme Court of the United States declined to decide.

Purpose of the Fifth Amendment.—Mr. Justice Brown declared it to be the purpose of the fifth amendment to establish in express language and upon a firm basis the general principle of English and American jurisprudence, that no one shall be compelled to give testimony which may expose him to prosecution for crime. The amendment does not declare that one may not be compelled to testify to facts which may impair his reputation for probity, or even tend to disgrace him, but the line is drawn at testimony that may expose him to prosecution. If the testimony relates to criminal acts long since past and against the prosecution of which the statute of limitations has run, or for which he has already received a pardon or is guaranteed an immunity, the amendment does not apply.

⁴⁸ Foot v. Buchanan, 113 Fed. Rep., 156, 159, 160.

⁴⁹ 203 U. S., 96, 105.

The fifth amendment operates only where the witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge. But the amendment would not apply if the criminality has already been removed, for it is a present, and not a past criminality, which is provided against.⁵⁰

Nor be deprived of life, liberty, or property without due process of law.

This is the most important provision of the amendment. The most priceless possessions of mankind are life, liberty, and property, and any provision of the Constitution, or any law, which secures mankind in the enjoyment of these rights must be of inestimable value. Since no one can be deprived of these blessings except by due process of law, it is necessary, for a correct understanding of the clause, to first ascertain what is meant by that term.

No fixed definition of "due process of law."—This term does not appear in the original Constitution, and it is first found in the amendment under consideration. There is no fixed definition of "due process of law." It depends, says Mr. Justice Holmes, on circumstances, and varies with the subject matter and necessities of the situation.⁵¹

In *Davidson v. New Orleans*,⁵² it was said (p. 101): "This expression remains today without that satisfactory precision of definition which judicial decisions have given to nearly all the other guarantees of personal rights found in the constitutions of the several States and of the United States." Again: "A most exhaustive judicial inquiry into the meaning of the words, 'due process of law,' as found in the fifth amendment, resulted in the unanimous decision of this court, that they do not necessarily imply a regular proceeding in a court of justice, or after the manner of such courts" (p. 102).

The expression came up for consideration before the Supreme Court of the United States in 1855 in the case

⁵⁰ *Hale v. Henkel*, 201 U. S., 43, 66, 67.

⁵¹ *Moyer v. Peabody*, 212 U. S., 78-84.

⁵² 96 U. S., 97, 101, 102.

of *Murray's Lessee v. Land Company*,⁵³ which in many respects remains the leading case on the subject. Mr. Justice Curtis in his opinion said (pp. 276-277):

"The Constitution does not declare what principles are to be applied to ascertain what amounts to due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will. To what principles, then, are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be twofold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provisions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

So numerous are the decisions relating to "due process of law" that it is not only undesirable to cite them all, but practically impossible. The courts have not reached a final and absolutely conclusive definition of the term, leaving it to be defined as the circumstances and facts of each case arise. A sufficient number of definitions, however, will be cited to show the usual and ordinary construction which the Supreme Court has placed upon the term.

What do the words "due process of law" mean?—The words "due process of law," when applied to judicial proceedings, mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.⁵⁴

So an act done in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights, is a sufficient definition of "due process of law."⁵⁵ In *Walker v.*

⁵³ 18 Howard, 272-276, 277.

⁵⁴ *Scott v. McNeal*, 154 U. S., 34, 46.

⁵⁵ *Kennard v. Louisiana*, 92 U. S., 480, 481.

Sauvinet,⁵⁶ Waite, Chief Justice, said due process of law is process due according to the law of the land.

In *ex parte Wall*,⁵⁷ the court said: That kind of procedure is due process of law which is suitable and proper to the nature of the case, and sanctioned by the established customs and usages of the courts.

In *Hurtado v. California*,⁵⁸ the court said: Any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves the principles of liberty and justice, must be held to be due process of law.

In *Leeper v. Texas*,⁵⁹ it was held: Law in its regular course of administration through the courts of justice is due process.

Law of the Land.—As far back as the time of Coke it was claimed by some writers that the expression "law of the land" meant the same as "due process of law," and Coke said that a statute passed in the reign of Elizabeth defined the words "law of the land" as meaning due process of law.⁶⁰

Daniel Webster, in his argument in the Dartmouth College case, used the expressions "law of the land" and "due process of law" as being equivalent, and said:

"By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society."

Judge Cooley said that no definition has been more often quoted than this given by Webster, and both Webster's definition and Cooley's remark thereon are approved in *Hovey v. Elliott*.⁶¹

Meaning of "due process of law" within this amend-

⁵⁶ 92 U. S., 90.

⁵⁷ 107 U. S., 265, 289.

⁵⁸ 110 U. S., 516, 537. *Trome v. Williams*, 194 U. S., 293.

⁵⁹ 139 U. S., 462, 468. *U. S. v. Ju Toy*, 198 U. S., 253, 263.

⁶⁰ Coke's Institutes, 50.

⁶¹ 167 U. S., 409, 418. Cooley's Constitutional Limitations, 502, 7th edition.

ment.—Due process of law within the meaning of the fifth amendment refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law.⁶²

What do the words "due process of law" include?—In *Pennoyer v. Neff*,⁶³ it was held: Due process of law means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.

What is necessary to give validity to the words "due process of law?"—To give such proceedings validity there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject matter of the suit; and, if that involves merely a determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.⁶⁴

A jury trial is not in all cases essential to due process of law.⁶⁵

Judge Cooley, in *Weimer v. Bunbury*,⁶⁶ said (p. 211):

"Due process of law does not necessarily imply judicial process. Much of the process by means of which the Government is carried on and the order of society maintained is purely executive or administrative. Temporary deprivations of liberty or property must often take place through the action of ministerial or executive officers or functionaries, or even of private parties, where it has never been supposed that the common law would afford redress."

Process which divests property is due process of law.—"There is nothing technical," continues Judge Cooley (p. 213), "or we think, obscure, in the requirement that

⁶² *Hurtado v. California*, 110 U. S., 516, 535.

⁶³ 95 U. S., 714, 733.

⁶⁴ *Pennoyer v. Neff*, 95 U. S., 733. *Scott v. McNeal*, 154 U. S., 34, 46.

⁶⁵ *Montana Co. v. St. Louis Mining Co.*, 152 U. S., 161, 171, 18 How. 272. *Palmer v. McMahon*, 133 U. S., 660.

⁶⁶ 30 Mich. 201, 211, 213, 214.

process which divests property shall be due process of law. The Constitution makes no attempt to define such process, but assumes that custom and law have already settled what it is. Even in judicial proceedings we do not ascertain from the Constitution what is lawful process, but we test their action by principles which were before the Constitution, and the benefit of which we assume that the Constitution was intended to perpetuate. If there existed, before that instrument was adopted, well known administrative proceedings which, having their origin in a legislative conviction of their necessity, had been sanctioned by long and general acceptance, we are no more at liberty to infer an intent in the people to prohibit them by implication from any general language, than we should be to infer an intent to abridge the judicial authority by the use of similar words."

Bills of Rights in the American Constitutions.—Speaking of the Bills of Rights in the American Constitutions, Judge Cooley said (p. 214):

"The Bills of Rights in the American Constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation. They are conservatory instruments rather than reformatory; and they assume that the existing principles of the common law are ample for the protection of individual rights, when once incorporated in the fundamental law, and thus secured against violation."

Administrative process is due process of law.—"We are, of necessity," continued Judge Cooley, "driven to an examination of the previous condition of things, if we would understand the meaning of due process of law, as the Constitution employs the term. Nothing previously in use, regarded as necessary in government and sanctioned by usage, can be looked upon as condemned by it. Administrative process of a customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments if this were otherwise."

When due process of law is not violated.—In *Fallbrook Irrigation District v. Bradley*⁶⁷ it was held: "Due process

⁶⁷ 164 U. S., 112, 168.

of law is not violated, and the equal protection of the laws is given, when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the States, and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the statute."

Also in *Kelly v. Pittsburg*⁶⁶ the court held: "Where the necessities of the Government, the nature of the duty to be performed, and the customary usages of the people have established a procedure for the collection of taxes in this country, it is, and always has been, due process of law."

In *Ex parte Wall*,⁶⁷ held: "The action of the court in cases within its jurisdiction is due process of law. It is a regular and lawful method of proceeding practiced from time immemorial. Conceding that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution, it is certain that in many cases, at least, he may be excluded from the pursuit of it by the summary action of the court of which he is an attorney."

Executive orders may be due process of law.—The court said⁷⁰ in *Public Clearing House v. Coyne*, "It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. That due process of law does not necessarily require the interference of the judicial power as laid down in many cases and by many eminent writers upon the subject of constitutional limitations."

Deprivation of life without due process of law.—In

⁶⁶ 104 U. S., 78, 82.

⁶⁷ 107 U. S., 265, 288.

⁷⁰ 194 U. S., 497, 508.

Hopt v. Utah (p. 579), it was held: That in felony cases it is not within the power of the accused or of his counsel to dispense with the statutory requirement as to his personal presence at the trial. The public has an interest in his life and his liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in the proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure when on trial and in custody to object to one authorized method. The great end of punishment is not the expiation or atonement, but the prevention of future offenses of the same kind. If the defendant be deprived of his life or liberty without being present, such deprivation would be without that due process of law required by the Constitution.⁷¹

In *Ball v. United States*,⁷² Fuller, Chief Justice, cited with approval the language of Justice Schofield in *Fielden v. The People*,⁷³ setting forth the reasons why the defendant should be present before the court at the time of pronouncing sentence: That the defendant might be "identified by the court as the real party adjudged guilty; that he might have a chance to plead a pardon, or move in arrest of judgment; that he might have an opportunity to say why judgment should not be given against him; and that the example of being brought up for the animadversion of the court and the open denunciation of punishment might tend to deter others from the commission of similar offenses. The accused (p. 136) is entitled to be informed of the nature and cause of the accusation against him, and jurisdiction should not be exercised when there is doubt as to the authority to exercise it. All the essential ingredients of the offense charged must be stated in the indictment, embracing with reasonable certainty the particulars of time and place, that the accused may be enabled to prepare his defense and avail himself of his acquittal or conviction against any further prosecution for the same cause."

Deprivation of liberty without due process of law.—

⁷¹ 110 U. S., 574, 579.

⁷² 140 U. S., 131.

⁷³ 128 Ill., 595.

What is meant by the term liberty as it appears in this clause? The provision that no person shall be deprived of life, liberty or property without due process of law first appears in the amendment under consideration.

Liberty does not mean freedom from restraint.—"The liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly free from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. Society based on the rule that each one is a law unto himself would soon be confronted with disorder and anarchy. Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others."⁷⁴

"Liberty, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same right by others. It is then liberty regulated by law. The right to acquire, enjoy and dispose of property is one of the inalienable rights of man. But this declaration is not to preclude legislation in respect of the acquisition, enjoyment and disposition of property. What contracts respecting its acquisition and disposition shall be valid and not void or voidable, when they shall be in writing and when they may be made orally and by what instruments it may be conveyed or mortgaged, are subjects of constant legislation. And as to the enjoyment of property, the rule is general that it must be accompanied with such limitations as will not impair the equal enjoyment by others of their property."⁷⁵

Deprivation of property without due process of law.—In the great case of *Entick v. Carrington*,⁷⁶ decided in

⁷⁴ *Jacobson v. Massachusetts*, 197 U. S., 11, 26.

⁷⁵ *Crowley v. Christiansen*, 137 U. S., 86. This case distinguished from *Yick Wo v. Hopkins*, 118 U. S., 356.

⁷⁶ 19 Howell's State Trials, 1066.

1765, Lord Chief Justice Cambden said: "The great end, for which men entered into society, was to secure their property." In the Constitutional Convention Gouverneur Morris stated: "Property was the main object of society. The savage state was more favorable to liberty than the civilized. It was preferred by all men who have not acquired a taste for property; it was only renounced for the sake of property which could only be secured by the restraints of regular government."⁷⁷

After the blessings of life and liberty the right to acquire and hold property is the most valuable which a human being can possess. It is largely the foundation upon which civilized society and the State are constructed, and if mankind were deprived of the right to acquire and own property it is doubtful if civil government would long endure.

Definition of property.—The word property is from the Latin *proprius*, meaning one's own. Various definitions have been given of this term. As applied to lands, it means every kind of title.⁷⁸ Also, "the sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the right of any other individual in the universe."⁷⁹ It is the "free use and enjoyment by a person of all his acquisitions, without any control or diminution, save only by the law of the land."⁸⁰ Property, in a general sense, may be defined to be anything which a person owns.

What is not a taking of private property without due process of law.—A statute creating a park in the District of Columbia which provides for an assessment of adjoining lands in the District to meet the expenses of making, improving and maintaining the park does not authorize the taking of private property without due process of law. *Wilson v. Lambert*.⁸¹

A statute declaring the emission of dense smoke from chimneys in the District of Columbia a nuisance and prohibiting it, does not override "due process of law."⁸²

⁷⁷ Journal, 298.

⁷⁸ *Soulard v. United States*, 4 Peters, 511.

⁷⁹ 2 Blackstone's Commentaries, 2.

⁸⁰ *Stevens et al. v. State*, 2 Ark., 291-299.

⁸¹ 168 U. S., 612, 614.

⁸² *Moses v. United States*, 16 D. C. Appeal Cases, 428, 433.

Nor does a statute which restrains the importation of certain goods into the United States for reasons of public policy.⁸³

Nor does seizing and forfeiting counterfeit coin. There can be no property in such an article.⁸⁴

Nor does a proceeding against an attorney to disbar him from the practice of his profession for conduct for which an indictment would lie, when due notice had been given and a trial and hearing were had before the court.⁸⁵

A trial by a court illegally constituted is not "due process of law."⁸⁶

Due process of law as applied to aliens.—Congress has from time to time passed acts regulating emigrants and providing for the removal or deportation of persons who in its opinion were not fit to become citizens of the United States. The enforcement of these provisions was placed by the acts in question on the executive officers of certain departments of the government. The laws were resisted as being contrary to the provisions of this amendment in that they deprived aliens and others of liberty and property without due process of law. The result has been that a number of important and interesting decisions have been rendered in which the amendment has been construed with special reference to this class of questions. The most important of these decisions have been grouped together under the following heading.

Decisions of executive officers as to excluding and deporting aliens valid.—In *Nishimura Ekiu v. United States*,⁸⁷ it was held: "It is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the National

⁸³ *Buttfield v. Stranahan*, 192 U. S., 471, 493.

⁸⁴ 23 A. G. Op. 459, 462.

⁸⁵ *Ex parte Wall*, 107 U. S., 265, 288, 289.

⁸⁶ 22 A. G. Op., 137, 138.

⁸⁷ 142 U. S., 651, 660; 158 U. S., 538; 185 U. S., 296; 189 U. S., 86; 149 U. S., 698.

Government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by Congress, are "due process of law."

While a certificate of admission as a citizen entitles a subject of the Emperor of China to enter the United States it does not have the effect of a judicial determination. It can be overcome by proper evidence, yet having been made in conformity to the existing treaty between China and the United States, and the holder of it having been duly admitted to a residence in the United States, he cannot be deported because of wrongfully entering the United States upon a fraudulent certificate, unless there is competent evidence by which the legal certificate may be overcome.⁸⁸

Nor shall private property be taken for public use without just compensation.

Ownership of private property has always been respected and protected by law. It was an ancient principle that private property could not be taken for public use without the payment of a just price. Among the Romans respect for private property was especially regarded. Tacitus tells us that Pius Aurelius, a Roman Senator, complained that the foundations of his house had been weakened by the pressure of the public road and aqueduct, and he appealed to the Senate. He was opposed by the praetors of the treasury, but the Emperor Tiberius paid him the value of his house, from his own pocket.⁸⁹ From Livy we learn that when the censors, M. Emilius Lepidus and M. Flaccus Nobilior, proposed to build an aqueduct in 179 B. C., the plan failed because Lucinius Crassus would not allow it to be laid through his lands.⁹⁰ According to Frontinus, if any owner of lands on the line of an aqueduct which the Romans desired to build was unwilling to sell the portion required for the public work, the whole farm was bought by the State, and after taking what was requisite, the rest was sold.⁹¹ Modern

⁸⁸ *Liu Hop Fong v. United States*, 209 U. S., 453-463.

⁸⁹ *Annals of Tacitus*, Book I, sec. 75.

⁹⁰ *Livy*, Book XI.

⁹¹ *Frontinus*, 297.

jurisprudence certainly does not furnish any higher conception of equity than this. The Roman Senate—possibly as the result of experiences with private owners of land—passed a decree that private property could be taken for public use, upon an estimate being made therefor by *good men*. This was the origin of this principle.

It was one of the provisions of Magna Charta that no one should be deprived of his property except by the law of the land, and by the judgment of his peers. The principle does not seem to have been confined to the civil or the common law. It is recorded that in Turkey the Sultan Mustaphah, being desirous of building and endowing a new mosque, fixed upon a spot in the city of Constantinople which belonged to a number of land-owners. He treated with all of them and they all willingly complied with his wishes, except a Jew who owned a small house and refused to give it up. A considerable price was offered him, but he resisted the most tempting offers. His partiality for the spot, or his obstinacy, was stronger than his avarice. All the city was astonished at his rashness, and expected every hour to see his house demolished and his head upon a pole. But what was the conduct of the Sultan? Of one man who was the absolute master of the lives of millions? He consulted his mufti, who answered that private property was sacred, that the laws of the prophet forbade his taking it absolutely, but he might compel the Jew to lease it to him as long as he pleased, at a full rental, and the Sultan submitted to the law.⁹²

It was a provision in the Napoleonic code that, "No one can be compelled to give up his property except for the public good, and for a just and previous indemnity."⁹³ So universal is the recognition of this principle that in addition to its incorporation into our Federal Constitution there is probably not a State in the Union whose Constitution does not embody it. It will not, therefore, be said that inserting this provision in the amendment established any new principle of law or justice, but on the contrary, it was only recognizing in a constitutional form what had existed at common law and in equity for a very

⁹² De Tott's Memoirs of the Turkish Government.

⁹³ Code of Napoleon, art. 545.

long time, and had been an established principle of the civil law.

To this principle, however, there are exceptions which seem to be as old as the principle itself. Grotius tells us that "things belonging to the subjects are under the supereminent power of the Commonwealth, whereof they are a part, so that that Commonwealth, or he that exercises the supreme power in it, hath a right to make use thereof, either by even destroying them, or by alienating them, and that not only in a case of extreme necessity, which is even between private men justifiable; but when it extends even to the good of the public, which is always to be preferred before any private man's, by the general consent of those who first entered into civil society: Which notwithstanding is so to be understood, that the whole Commonwealth is obliged to repair the damages, that shall befall any of her subjects or citizens, by reason of any such spoil or alienation, out of their public stock, or by a public contribution; whereunto even he who has sustained the loss, shall (if need be) pay his proportion. Neither shall that City or Commonwealth stand discharged from this obligation, although at present it be not able to satisfy it; for whensoever that City shall be enabled, this sleeping obligation may rise up against it."⁹⁴

In *Mitchel v. Harmony*,⁹⁵ it was held: "There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the Government is bound to make full compensation to the owner. The officer is not a trespasser. But in all these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every

⁹⁴ Grotius on Rights of War and Peace, Book I, 545.

⁹⁵ 13 Howard, U. S., 115, 134.

case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified."

In *Parham v. The Justices, etc.*,⁹⁶ it was declared: "It is not to be doubted but that there are cases in which private property may be taken for a public use, without the consent of the owner and without compensation, and without any provision of law for making compensation. These are cases of urgent public necessity, which no law has anticipated, and which cannot await the action of the Legislature. In such cases, the injured individual has no redress at law—those who seize the property are not trespassers, and there is no relief for him but by petition to the Legislature. For example: the pulling down houses, and raising bulwarks for the defense of the State against an enemy; seizing corn and other provisions for the sustenance of an army in the time of war, or taking cotton bags, as General Jackson did at Orleans, to build ramparts against an invading foe. These cases illustrate the maxim *salus populi suprema lex*, the good of the public is the supreme law. Extreme necessity alone can justify these cases and all others occupying the same grounds."

Having traced the origin of this clause to the civil law, and having seen that its principle was recognized by the Roman Senate and a Roman Emperor, and having also seen that there are exceptions to it, which are justified by the law, and that it contains no new principle but only reduces an ancient principle to a constitutional provision, let us now examine the specific language of the clause.

The clause naturally separates itself into the four following important parts:

First, what is private property?

Second, what constitutes a taking?

Third, what is a public use?

Fourth, what is just compensation?

These will be considered in their order.

What is Private Property?—In *Scranton v. Wheeler*,⁹⁷ Mr. Justice Harlan said p. 153: "What is private property within the meaning of the Fifth Amendment to the Con-

⁹⁶ 9 Georgia, 341, 348, 349.

⁹⁷ 179 U. S., 141, 163.

stitution is not always easy to determine. No decision in this court has announced a rule that will embrace every case." It was held by the court that the expression did not apply to an owner of land adjoining a navigable river, whose access from his land to the river is destroyed by the construction of piers, by authority of Congress, which rested on lands beneath the water, and away from, but in front of the owners upland, and which piers were erected without intending to injure his property.

A learned commentator on the Constitution said: "Private property is the sacred right of individual dominion."⁹⁸

In *Commissioners v. Withers*,⁹⁹ private property was held to include such property as belongs absolutely to an individual, and of which he has the exclusive right of disposition; property of a specific, fixed and tangible nature, capable of being held in possession and transferred to another, as houses, lands and chattels.

In *Lycoming Gas and Water Company v. Moyer*,¹⁰⁰ it was held that private property necessarily includes everything that can be held or owned by private persons.

In *People v. Daniels*,¹⁰¹ Zane, Chief Justice said: Private property means all kinds of private property.

The question naturally arises what kind of property may be taken. The answer is, any property which is necessary for the public use. This would include stone;¹⁰² dwelling houses;¹⁰³ franchises;¹⁰⁴ easements;¹⁰⁵ water;¹⁰⁶ land;¹⁰⁷ lands in the Cherokee Nation.¹⁰⁸ Lands may be taken, though the fee of the soil is in the State.¹⁰⁹ An exception to this rule is that money cannot be taken

⁹⁸ Paschal on the Constitution, 261.

⁹⁹ *Commissioners, etc., v. Withers*, 29 Miss., 21, 32.

¹⁰⁰ *Gas and Water Co. v. Moyer*, 99 Penn., 615, 619.

¹⁰¹ *Utah v. Daniels*, 6 Utah, 288, 298.

¹⁰² *Lyons v. Jerome*, 15 Wendell, 569; *Bliss v. Hosmer*, 15 Ohio, 44.

¹⁰³ *Wells v. Railroad Co.*, 47 Maine, 345.

¹⁰⁴ *Bridge Co. v. Railroad Co.*, 17 Conn., 40; *Greenwood v. Freight Co.*, 105 U. S., 13; *Navigation Co. v. U. S.*, 148 U. S., 312.

¹⁰⁵ *Lowndes v. United States*, 105 Fed. Rep., 838.

¹⁰⁶ *Gardner v. Hasbronck et al.*, 2 Johnson Ch., 162.

¹⁰⁷ *Luxton v. North River Bridge Co.*, 153 U. S., 525.

¹⁰⁸ *Cherokee Nation v. Southern Kansas Ry. Co.*, 135 U. S., 641.

¹⁰⁹ *Navigation Co. v. United States*, 148 U. S., 342.

under the clause authorizing the taking of private property.¹¹⁰

What is a taking of private property within this clause?—This question was considered and decided in *Pumpelly v. Green Bay Company*.¹¹¹ A dam had been erected by the Green Bay Company across Fox River, which is the northern outlet of Lake Winnebago in Wisconsin. The dam so raised the water of the lake as to cause it to overflow the land of the plaintiff, and the water remained on the land for some years, to its great detriment. Action was brought against the company for the unlawful taking of the property of the plaintiff. The Constitution of Wisconsin provides that, "The property of no person shall be taken for public use without just compensation therefor." It was declared by the company that the land was not "*taken*" within the meaning of the Constitution. Miller, Justice, in delivering the opinion of the Supreme Court, said (p. 177): "It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the Government, and which has received the commendation of jurists, statesmen, and commentators as placing the just principles of the common law on that subject beyond the power of ordinary legislation to change or control them, it shall be held that if the Government refrain from the absolute conversion of real property to the uses of the public it can destroy its value entirely, can inflict irreparable and permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation, because, in a narrow sense of that word, it is not *taken* for the public use. Such a construction would pervert the constitutional provision into a restriction upon the rights of the citizen, as those rights stood at the common law, instead of the Government, and make it an authority for invasion of private right under the pretext of the public good, which had no warrant in the laws or practices of our ancestors."

¹¹⁰ *Williams v. Mayor*, 2 Mich., 566, 567.

¹¹¹ 13 Wall., 166, 177.

In *People v. Daniels*,¹¹² Zane, Chief Justice, in construing this clause of this amendment said: "The Government may appropriate the property of the individual when necessary in one of three ways. *First*, By taking in the mode prescribed after paying the owner for it; *Second*, by estimating the benefits to the owner's property from the improvements to be made, and taking the amount estimated in money; *Third*, by taking the property in form of money by the methods of taxation for which the benefits of protection and other advantages are furnished by the Government. The same principle underlies all these methods. When the property is taken under the right of eminent domain, the public pays the owner in money; when money is exacted by means of a special assessment, the owners are compensated in special benefits to their property by public improvements made in its expenditure; and when money is exacted by a general tax, the payer is compensated in the benefits received from the Government in any and all of the ways that a Government may benefit society. Thus the individual is compensated for the property he parts with, whether it consists of lands or money or other property. Effect may be given to a law according to the letter in which it is couched, or it may be construed in the light of the conditions in which it is to be applied, and be made to affect everything within the reach of its just implications. . . .

"The word 'taken' in this clause embraces the appropriation by any method, and the expression 'just compensation' includes any compensation, whether in money or benefits, provided the compensation is a just one—a fair equivalent for the property parted with."¹¹³

It was held that the backing of water which causes it to overflow land is a taking.¹¹⁴ And a practical destruction or material impairment of the value of lands is a taking.¹¹⁵

But it was held in *Scranton v. Wheeler*,¹¹⁶ that this clause does not apply to the case of an owner of land

¹¹² 6 Utah, 297.

¹¹³ *People v. Daniels*, 6 Utah, 288, 297, 298.

¹¹⁴ *United States v. Lynah*, 188 U. S., 445, 470.

¹¹⁵ *Manigault v. Spring*, 199 U. S., 473, 484.

¹¹⁶ 179 U. S., 141.

which borders on a navigable river, where the owner's access from his land to the river was permanently destroyed by reason of constructing under an act of Congress, a pier which rested on submerged lands away from, but in front of his land, this pier being erected by the United States without intent to injure the private land adjoining but only for the purpose of improving the navigability of the river. It was further held in this case that the superior authority of Congress to improve the navigability of one of the rivers of the United States should not be lessened by compelling the Government to make restitution for an injury to an owner's land which injury might incidentally result from an order of Congress.

The decision in this case seemed to rest upon the absolute control which Congress has over commerce and the power to regulate interstate commerce and the navigable waters of the country.

What is not a taking of private property?—There is a class of cases which establish a different doctrine and hold that in certain instances where there has been substantial damage to private property, nevertheless there is no liability on the part of the Government.

These cases cover the doctrine of riparian ownership, the construction of walls into or along water lines, and acts done in pursuance of the powers of sovereignty, by which the use and value of private property is impaired. In such cases the courts have held that there is not a taking of private property within the meaning of the fifth amendment, although there has been injury. The idea that the owners of the property cannot recover from the Government rests upon the principle that what the Government did in these cases was in exercise of its powers of sovereignty, and private ownership in such cases must bow to the public good.

The case of *Gibson v. United States*,¹¹⁷ states the doctrine in reference to riparian ownership. It appeared from that case the plaintiff was the owner of a tract bordering the Ohio River. This land, at the time complained of, was in a high state of cultivation, and had on it a

¹¹⁷ 166 U. S., 269, 275, 276.

good dwelling house, barn and other buildings. The plaintiff was engaged in market gardening, cultivating and shipping small fruits to market. The farm had a frontage of a thousand feet on the main channel of the river, where there was a landing which was used in shipping products from and supplies to the farm. This landing was the only one on plaintiff's farm. Congress, under an act, authorized the improvement of the Ohio River. In the process of the improvement a dike was constructed by the Government which substantially destroyed the landing, cutting off all thoroughfare thereto, so that the plaintiff was unable to use her landing for shipment and so that with the ordinary stage of water, the plaintiff could ship only by going over a neighbor's farm to another landing. The plaintiff's land was worth six hundred dollars an acre before the construction of the dike, but the dike reduced its value about one hundred and fifty to two hundred dollars an acre, and the total damage to the farm exceeded three thousand dollars. No water was thrown back on the land by the dike, and the dike itself did not touch the claimant's land. In making the improvements the defendants did not recognize any right of property in the claimant, did not attempt or assume to take private property, but proceeded in the exercise of a claimed right to improve the navigation of the river. Fuller, Chief Justice, in delivering the opinion for the court (p. 275), said:

"The Fifth Amendment to the Constitution of the United States provides that private property shall not 'be taken for public use without just compensation.' Here, however, the damage of which Mrs. Gibson complains was not the result of the taking of any part of her property, whether upland or submerged, or a direct invasion thereof, but the incidental consequence of the lawful and proper exercise of a governmental power. . . . Riparian ownership is subject to the obligation to suffer the consequences of the improvement of navigation in the exercise of the dominant right of the Government in that regard. The legislative authority for these works consisted simply in an appropriation for their construction, but this was an assertion of a right belonging to the Government, to which riparian property was subject, and

not of a right to appropriate private property, not burdened with such servitude, to public purposes. In short, the damage resulting from the prosecution of this improvement of a navigable highway, for the public good, was not the result of a taking of appellant's property, and was merely incidental to the exercise of a servitude to which her property had always been subject."

An act of Congress required the payment of duties on certain articles imported from the Philippine Islands; after certain duties had been paid the act was held invalid. Another act of Congress legalized and ratified the provisions of the first act. It was held in *United States v. Heinszen & Co.*,¹¹⁸ that the second act did not amount to the taking of property without due process of law, or the taking of property for public use without just compensation and thus was not in violation of the Fifth Amendment.

Bedford v. United States,¹¹⁹ was a case where the Government constructed a revetment or line of wall along the banks of the Mississippi River, the effect of which was to resist the erosion of the bank by the water, there being no other interference with natural conditions. The court held that an action for damages as the result of such improvements could not be maintained, and that such incidental consequences as the result of the improvement were not a taking of the property within the meaning of the fifth amendment.

In *United States v. Certain Lands*,¹²⁰ the erection and use of a fortification for coast defense were declared by the owner of a summer residence upon neighboring lands, not taken for the public use, "to defeat much of the purpose he had in view in the purchase thereof, and in making his erections and improvements thereon." The court held that the fact that the value of his estate is impaired thereby, gives him no right to compensation. Acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the amendment.

¹¹⁸ 206 U. S., 386.

¹¹⁹ 192 U. S., 217, 224, 225.

¹²⁰ 112 Fed. Rep., 622.

What is a public use?—So eminent a constitutional authority as Judge Cooley said: "We find ourselves somewhat at sea, when we undertake to define, in the light of the judicial decisions, what constitutes a public use."¹²¹ This remark is applicable to other provisions of the Federal Constitution. In the multitude of judicial opinions it would be marvelously strange if we did not find apparent inconsistencies. The subject is too broad for us to consider all the decisions concerning it, so that we will confine our view to a limited number of judicial expressions that the general course of authority may be seen.

Judge Cooley says: "In all such cases the object of the legislative grant of power is the public benefit derived from the contemplated improvement, whether such improvement is to be effected directly by the agents of the Government, or through the medium of corporate bodies, or of individual enterprise. . . . The reason of the case and the settled practice of free governments must be our guides in determining what is or is not to be regarded a public use; and that only can be considered such where the Government is supplying its own needs, or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience, or welfare, which, on account of their peculiar character, and the difficulty—perhaps impossibility—of making provision for them otherwise, it is alike proper, useful and needful for the Government to provide."¹²²

Illustrations of what is a public use.—Taking land for the purpose of surveying, locating and preserving battle lines at Gettysburg, and marking the sites upon which the battle occurred, and erecting monuments on the battlefield in pursuance of an act of Congress is taking it for public use.¹²³

Taking lands for squares in cities is taking it for a public use.¹²⁴ So is taking lands for a railroad, the construction of which is authorized by an act of Congress.¹²⁵

¹²¹ Cooley's Constitutional Limitations, 766.

¹²² Cooley's Constitutional Limitations, 767, 768.

¹²³ United States v. Gettysburg Electric Railway Co., 160 U. S., 688.

¹²⁴ Shoemaker v. United States, 147 U. S., 282-298.

¹²⁵ Baltimore & O. R. Co. v. Van Ness et al., Federal Cases, No. 830.

What is a public use frequently and largely depends upon the facts and circumstances.¹²⁶

In *Kaukauna v. Green Bay, etc.*,¹²⁷ it was decided that the improvement of the navigation of a river is a public purpose, and the appropriation of land or other property therefor is doubtless a proper exercise of the authority of the State under its power of eminent domain.

What is just Compensation?—In *Monongahela Navigation Co. v. United States*,¹²⁸ in discussing the provision “nor shall private property be taken for public use without just compensation,” Mr. Justice Brewer said:

“The noun ‘compensation,’ standing by itself, carries the idea of an equivalent. Thus we speak of damages by way of compensation, or compensatory damages, as distinguished from punitive or exemplary damages, the former being the equivalent for the injury done, and the latter imposed by way of punishment. So that if the adjective ‘just’ had been omitted, and the provision was simply that property should not be taken without compensation, the natural import of the language would be that the compensation should be the equivalent of the property. And this is made emphatic by the adjective ‘just.’ There can, in view of the combination of those two words, be no doubt that the compensation must be a full and perfect equivalent for the property taken. And this just compensation, it will be noticed, is for the property, and not to the owner. Every other clause in this Fifth Amendment is personal. ‘No person shall be held to answer for a capital, or otherwise infamous crime,’ etc. Instead of continuing that form of statement, and saying that no person shall be deprived of his property without just compensation, the personal element is left out, and the ‘just compensation’ is to be a full equivalent for the property taken. This excludes the taking into account, as an element in the compensation, any supposed benefit that the owner may receive in common with all from the public uses to which his private property is appropriated, and leaves it, to stand as a declaration, that no private prop-

¹²⁶ *Fallbrook Irrigation District v. Bradley*, 164 U. S., 159, 160.

¹²⁷ 142 U. S., 272.

¹²⁸ 148 U. S., 312, 326.

erty shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner."

In *Chesapeake & Ohio Canal Company v. Key*¹²⁹ it was held (p. 601): "Just compensation means a compensation which would be just in regard to the public, as well as in regard to the individual; and if the jury should be satisfied that the individual would, by the proposed public work, receive a benefit to the full value of the property taken, it could not be said to be a just compensation, to give him the full value. If the jury would have a right to consider the benefit as well as the damage, without the provision of the charter which requires them to do so, the same objection would still exist, namely, that under the provisions of the charter, it might happen that no compensation at all, or, at most, a nominal compensation, would be made. The insertion, therefore, of that provision in the charter which requires the jury to do what they would be competent to do without such a provision, and which, in order to ascertain a compensation which should be just towards the public, as well as just towards the individual, they ought to do, cannot be considered as repugnant to the Constitution."

Benefit to owner as an element of just compensation.—In *Bauman v. Ross*,¹³⁰ it was decided: "The Constitution of the United States contains no express prohibition against considering benefits in estimating the just compensation to be paid for private property taken for the public use; and, for the reasons and upon the authorities above stated, no such prohibition can be implied; and it is therefore within the authority of Congress, in the exercise of the right of eminent domain, to direct that, when part of a parcel of land is appropriated to the public use for a highway in the District of Columbia, the tribunal vested by law with the duty of assessing the

¹²⁹ 3 Cranch, C. C., 599.

None of these written Constitutions define the term "just." None of them are so rash as to attempt to answer the question of Socrates: "What is Justice?" So that what is "just compensation" must ultimately depend on public opinion at the time when the compensation comes to be given as much as in Great Britain, where there is no written Constitution, and where we have hitherto got on somehow without declaring our natural rights. Ritchie's *Natural Rights*, 265.

¹³⁰ 167 U. S., 548, 584.

compensation or damages due to the owner, whether for the value of the part taken, or for any injury to the rest, shall take into consideration, by way of lessening the whole or either part of the sum due him, any special and direct benefits, capable of present estimate and reasonable computation, caused by the establishment of the highway to the part not taken."

Any appropriate tribunal may ascertain the value of the property.—In *United States v. Jones*,¹²¹ the court said:

"The proceeding for the ascertainment of the value of the property and consequent compensation to be made, is merely an inquisition to establish a particular fact as a preliminary to the actual taking; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon, Whether the tribunal shall be created directly by an act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion."

In *Bauman v. Ross*¹²² it was held: "By the Constitution of the United States, the estimate of the just compensation for property taken for the public use, under the right of eminent domain, is not required to be made by a jury; but may be entrusted by Congress to commissioners appointed by a court or by the Executive, or to an inquest consisting of more or fewer men than an ordinary jury."

¹²¹ 109 U. S., 513, 519.

¹²² 167 U. S., 548, 593.

CHAPTER LIV.

SIXTH AMENDMENT.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

At the time the Constitution was framed, the Constitutions of New Jersey, Massachusetts, Maryland and Pennsylvania contained similar provisions to this which no doubt suggested the insertion of this amendment in the national Constitution.

This amendment as introduced into the House of Representatives by Mr. Madison was part of his first amendment and read: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, to be informed of the cause and nature of the accusation, to be confronted with his accusers, and the witnesses against him; to have a compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense."¹

It will be observed that this form provided, "The accused should be confronted with his accusers," but the amendment as adopted omits this important provision. This omission occurred in the report of the Committee of Eleven.² The amendment was not debated at length in the House,³ but was agreed upon by a committee of conference.⁴

¹ 1 Annals, 452.

² Thorpe's Constitutional History of the United States, vol. 2, 226.

³ 1 Annals, 452, 782, 785.

⁴ 1 Annals, 948.

This amendment contains some of the most important provisions of the Constitution relative to crimes and criminal procedure. Most of its provisions, like those in most of the amendments, are found in the principles of the common law and confer no rights upon an accused person, beyond those which the common law gave one who was being criminally prosecuted.

This amendment is not a limitation on the power of the States, and its provisions do not apply to the State courts.⁵

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.—This clause relates to the prosecution of an accused person, which is technically criminal in its nature.⁶ A criminal prosecution under article 6, of the amendments, is much narrower than a "criminal case" under article 5 of the amendments.⁷

In *Ex parte Milligan*,⁸ Davis, Justice, said: "The great minds of the country have differed on the correct interpretation to be given to various provisions of the Federal

⁵ *Ughbanks v. Armstrong*, 208 U. S., 487. *Spies v. Illinois*, 123 U. S. 131. *Eilenbecker v. Dist. Court*, 134 U. S., 31. *Brown v. New Jersey*, 175 U. S., 172-174. *Maxwell v. Dow*, 176 U. S., 581-586. *Wert v. Louisiana*, 194 U. S., 258, 262. *Howard v. Kentucky*, 200 U. S., 164, 172.

⁶ *United States v. Zucker*, 161 U. S., 475, 481.

⁷ *Counselman v. Hitchcock*, 142 U. S., 547, 563.

⁸ 4 Wallace, 122, 123.

Mr. Charles O'Connor in his argument upon the motion to quash the indictment in the case of *United States v. Jefferson Davis*, speaking of the cruelties which were practiced in England for many years preceding the American Revolution says:

"The accused were generally convicted and executed with all the attendant horrors enumerated in the barbarous treason sentence. They were hanged, drawn, and quartered. Many of the cases are stated in Sir Michael Foster's *Treatise on Crown Law*. This work, first published in 1761, soon found its way across the Atlantic; and just about the time when 'the troubles in America,' as they were called, began to unsettle British authority here. The harsh treatment and cruel fate of these true-hearted people were thus fully described and made known to our people. One of the most thrilling of these scenes was the subject of Shenstone's touching ballad, 'Jemmy Dawson.' It can not be doubted that the feelings excited by these cruel prosecutions induced the adoption of the Sixth Amendment. It was intended that no such transaction should ever stain the judicial annals of our country." *Chase's Decisions*, 121.

Constitution; and judicial decision has been often invoked to settle their true meaning; but until recently no one ever doubted that the right of trial by jury was fortified in the organic law against the power of attack. It is now assailed, but if ideas can be expressed in words, and language has any meaning, *this right*—one of the most valuable in a free country—is preserved to every one accused of crime who is not attached to the army, or navy or militia in actual service. The framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the Sixth Amendment, to those persons who were subject to indictment or presentment in the Fifth.”

There are some exceptions to the rule that all persons indicted are entitled to trial by jury, and among these are the following:

Crimes and accusations which at the time of the adoption of the Constitution were, by the regular course of law and the established modes of procedure, not the subjects of jury trial,⁹ are not so triable now.

When the issue of the insanity of a defendant is presented in a trial the Federal courts are governed by the rule of the common law, and the court may call a jury to determine the matter, or may do so himself, but the defendant is not entitled to a jury to pass on his sanity as a matter of right.

It is not “due process of law” to subject an insane person to trial upon an indictment involving liberty or life.¹⁰

Neither is one who is tried for contempt of court entitled to a jury trial.

In *In re Debs*¹¹ it was said: The power of a court to make an order carries with it the equal power to punish for disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court. And this is no technical rule. In order that the court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience thereof. To submit the question of disobedience to another tribunal, be it a jury or another

⁹ *In re Cross*, 20 Fed. Rep., 825. *State v. Glenn*, 54 Md., 600, 601.

¹⁰ *Youtsey v. United States*, 97 Fed. Rep., 937.

¹¹ 158 U. S., 564, 594.

court, would operate to deprive the proceeding of half its efficiency.

What is meant by a speedy and public trial?—This was considered in *Ex parte Stanley*.¹² "It is very clear," said the court, "that one arrested and accused of crime has not the right to demand a trial immediately upon the accusation or arrest being made. He must wait until a regular term of the Court having jurisdiction of the offense with which he is charged, until an indictment is found and presented, and until the prosecution has had a reasonable time to prepare for the trial. Nor does a speedy trial mean a trial immediately upon the presentation of the indictment or the arrest upon it. It simply means that the trial shall take place as soon as possible after the indictment is found, without depriving the prosecution of a reasonable time for preparation. The law is the embodiment of reason and good sense; hence, whilst it secures to every person accused of crime the right to have such charge speedily determined by a competent jury, it does not exact impossibilities, extraordinary efforts, diligence or exertion from the courts, or the representatives of the State; nor does it contemplate that the right of a speedy trial which it guaranteed to the prisoner shall operate to deprive the State of a reasonable opportunity of fairly prosecuting criminals."

"The speedy trial, to which a person charged with crime is entitled under the Constitution, then is, a trial at such time, after the finding of the indictment, regard being had to the terms of court, as shall afford the prosecution a reasonable opportunity, by the fair and honest exercise of reasonable diligence, to prepare for a trial; and if the trial is delayed or postponed beyond such period, when there is a term of court at which the trial might be had, by reason of the neglect or laches of the prosecution in preparing for trial, such delay is a denial to the defendant of his right to a speedy trial."¹³

The right to a speedy trial, while mandatory, is not absolute. The term "speedy" must be construed with a view to surrounding facts and circumstances. It is, said

¹² 4 Nevada, 113, 116.

¹³ *United States v. Fox*, 3 Montana, 517.

Mr. Justice McKenna, "relative and consistent with delays and depends upon circumstances and does not preclude the rights of public justice."^{13a}

Public trial.—The public trial to which an accused is entitled does not mean that the Court has no power to preclude certain persons from attending the trial. The matter largely rests in the discretion of the trial judge, because from the nature of the trial and the character of the evidence which may be introduced it would be proper for the judge to exclude certain persons from attending it.

The law upon this subject is comprehensively stated by Judge Cooley: "By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of the public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend; notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity are excluded altogether."¹⁴

The Constitution of Michigan, on the subject of public trials, has a similar provision to the one under consideration. In the trial of a criminal case in that State the Court directed an officer to stand at the door of the courtroom and "see that the room was not overcrowded, but that all respectable citizens be admit-

^{13a} *Beavers v. Haubert*, 198 U. S., 77, 86.

¹⁴ Cooley's Constitutional Limitations, Seventh Ed. 441.

ted and have an opportunity to get in when they applied." It was held that this was a violation of the constitutional provision in reference to public trials.¹⁵

So in a case where the trial judge left the courthouse for some minutes during the concluding argument for the State, but before doing so called a member of the bar to the bench with the consent of counsel; this was held to be error and that the defendant was entitled to have a legally constituted court at every stage of his trial.¹⁶

The trial shall be by an impartial jury.—This very important subject was considered by Chase, Chief Justice, in *Reynolds v. United States*:¹⁷

"By the Constitution of the United States (Amend. VI), the accused was entitled to a trial by an impartial jury. A juror to be impartial must, to use the language of Lord Coke, 'be indifferent as he stands unsworn.' Lord Coke also says that a principal cause of challenge is 'so called because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triers;' or, as stated in Bacon's Abridgment, 'it is grounded on such a manifest presumption of partiality, that, if found to be true, it unquestionably sets aside the . . . juror.' 'If the truth of the matter alleged is admitted, the law pronounces the judgment; but if denied, it must be made out by proof to the satisfaction of the court or the triers.' To make out the existence of the fact, the juror who is challenged may be examined on his *voir dire*, and asked any questions that do not tend to his infamy or disgrace.

"All of the challenges by the accused were for principal cause. It is good ground for such a challenge that a juror has formed an opinion as to the issue to be tried. The courts are not agreed as to the knowledge upon which the opinion must rest in order to render the juror incompetent, or whether the opinion must be accompanied by malice or ill-will; but all unite in holding that it must be founded on some evidence, and be more than a mere impression. Some say it must be positive; others, that it must be decided and substantial; others, fixed; and,

¹⁵ *People v. Murray*, 89 Mich., 276, 283-286.

¹⁶ *Elberbe v. State*, 75 Miss., 522, 531.

¹⁷ 98 U. S., 145, 154.

still others, deliberate and settled. All concede, however, that, if hypothetical only, the partiality is not so manifest as to necessarily set the juror aside. Mr. Chief Justice Marshall, in Burr's Trial, states the rule to be that 'light impressions, which may fairly be presumed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of the testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him.' The theory of the law is that a juror who has formed an opinion cannot be impartial. Every opinion which he may entertain need not necessarily have that effect. In these days of newspaper enterprise and universal education, every case of public interest is almost, as a matter of necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely anyone can be found among those best fitted for jurors who has not read or heard of it, and who has not some impression or some opinion in respect to its merits. It is clear, therefore, that upon the trial of the issue of fact raised by a challenge for such cause the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality. The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. No less stringent rules should be applied by the reviewing court in such a case than those which govern in the consideration of motions for new trial because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court.

"The challenge in this case most relied upon in the argument here is that of Charles Read. He was sworn on

his *voir dire*; and his evidence, taken as a whole, shows that he 'believed' he had formed an opinion which he had never expressed, but which he did not think would influence his verdict on hearing the testimony. We cannot think this is such a manifestation of partiality as to leave nothing to the 'conscience or discretion' of the triers. The reading of the evidence leaves the impression that the juror had some hypothetical opinion about the case, but it falls far short of raising a manifest presumption of partiality. In considering such questions in a reviewing court, we ought not to be unmindful of the fact we have so often observed in our experience, that jurors not unfrequently seek to excuse themselves on the ground of having formed an opinion, when, on examination, it turns out that no real disqualification exists. In such cases the manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside, and it will not be error in the court to refuse to do so. Such a case, in our opinion, was not made out upon the challenge of Read. The fact that he had not expressed his opinion is important only as tending to show that he had not formed one which disqualified him. If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed."

A Jury must consist of twelve men.—In *Maxwell v. Dow*,¹⁸ Peckham, J., said: "That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt."

But where a State constitution provides that an indicted party may be tried for a crime less than capital by a less

¹⁸ 176 U. S., 581, 586.

number of jurors than twelve it is not in conflict with this provision.¹⁹

In *West v. Gammon*²⁰ it was held by Day, C. J., that the constitutional provision giving citizens the right of trial by jury had reference to that right as it existed at the time of the adoption of the Constitution, and that the Sixth Amendment must be construed with reference to the common law right to a jury trial as that right existed when the amendment was adopted.

An act of Congress authorizing trials in Alaska for misdemeanors by a jury of six persons was unconstitutional.²¹

The Jury must be of the district in which the crime was committed.—In *Beavers v. Henkel*²² the court decided that the locality in which an offense is charged to have been committed determines under the Constitution and laws the place of court and trial.

In *United States v. Battiste*,²³ held by Story, Justice, that the jury are not judges of the law in a capital or other criminal case.

Which district shall have been previously ascertained by law.—This language conferred upon Congress the power to create districts. Subsequently by an act of Congress many of the districts which had been established were subdivided into divisions. The question arose whether an indictment found by a grand jury composed of citizens of a *division* of a district was valid, and whether juries could be drawn under *divisions*, or whether they must be drawn from the *whole district*. The district courts of the State of Washington disagreed upon the question, one court holding the Constitution did not authorize the subdivision of districts into divisions for the trial of criminal cases, the other holding it did. The decisions are found in *United States v. Dickson*, 44 Fed. Rep., 401; and *United States v. Wan Lee*, 44 Fed. Rep., 707.

The provisions of this amendment do not require that

¹⁹ *Thompson v. Utah*, 170 U. S., 343, 349, 353, 355.

²⁰ 98 Fed. Rep., 427.

²¹ *Rasmussen v. United States*, 197 U. S., 518, 521.

²² 194 U. S., 73, 83. *Beavers v. Haubert*, 198 U. S., 77, 86. *Dorr v. United States*, 195 U. S., 138, 144.

²³ 2 Sumner, 240, 243.

the defendant should be prosecuted in the district in which he may reside at the time the offense was committed, or in the district in which he may happen to be at that time, provided he is prosecuted where the offense was committed.²⁴ The requirement of the amendment is that the accused shall be tried in the district "where the crime was committed," and not "where the accused resides, or even in the district in which he was personally when he committed the crime."²⁵

To be informed of the nature of the accusation.—This is a most humane and just provision, and is one of the most valuable which the Constitution affords to an accused person. It would be difficult indeed for one who has been indicted to prepare his defense properly unless he should be informed of the nature of the charge against him. A mere general statement consisting of vague and indefinite expressions will not do. The charges must be specific and accurate.

In *United States v. Mills*,²⁶ the court remarked: "The general rule is that in indictments for misdemeanors created by statute, it is sufficient to charge the offense in the words of the statute. There is not that technical nicety required as to form, which seems to have been adopted and sanctioned by long practice in cases of ~~felony~~, and with respect to some crimes, where particular words must be used, and no other words, however synonymous they may seem, can be substituted. But in all cases the offense must be set forth with clearness, and all necessary certainty, to apprise the accused of the crime of which he stands charged."

In *United States v. Cook*²⁷ the court held: "Offenses created by statute, as well as offenses at common law, must be accurately and clearly described in an indictment, and if they cannot be, in any case, without an allegation that the accused is not within an exception contained in the statutes defining the offense, it is clear that no indictment founded upon the statute can be a good one

²⁴ *Burton v. United States*, 202 U. S., 344-387. *Armour's Packing Co. v. United States*, 209 U. S., 56-76.

²⁵ *In re Palliser*, 136 U. S., 257-265.

²⁶ 7 Pet., 138, 142.

²⁷ 17 Wall., 168, 174.

which does not contain such an allegation, as it is universally true that no indictment is sufficient if it does not accurately and clearly allege all the ingredients of which the offense is composed. With rare exceptions, offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment would be bad, and may be quashed on motion, or the judgment may be arrested, or be reversed on error."

In *United States v. Cruikshank*,²⁸ the court said: "In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right 'to be informed of the nature and cause of the accusation.' It is an elementary principle of criminal pleading, that where the definition of an offense, whether it be at common law or by statute, 'includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition; but it must state the species,—it must descend to particulars. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances.'"

The rule was stated in *United States v. Potter*,²⁹ as follows: "In order to properly inform the accused of the 'nature and cause of the accusation,' within the meaning of the Constitution and of the rules of the common law, . . . not only must all of the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity, to identify the transaction to which the indictment relates as to place, persons, things,

²⁸ 92 U. S., 557.

²⁹ 56 Fed. Rep., 89, 90.

and other details. The accused must receive sufficient information to enable him to understand reasonably, not only the nature of the offense, but the particular act or acts touching which he must be prepared with his proof; and when his liberty, and perhaps his life, are at stake, he is not to be left to be so scantily informed as to cause him to rest his defense upon the hypothesis that he is charged with a certain act or series of acts, with the hazard of being surprised by proof on the part of the prosecution of an entirely different act or series of acts, at least so far as such surprise can be avoided by reasonable particularity and fullness of description of the alleged offense."

When is the accused entitled to copy of indictment?—Where a person is indicted for a capital offense a copy of the indictment and list of the jurors and witnesses must be delivered to him two entire days before his trial, in pursuance of section 1033, Revised Statutes.

But in cases not capital the accused is not entitled to a copy of the indictment at the Government's expense, nor to a list of witnesses and jurors.

There is no general obligation on the part of the Government to furnish copies of indictments, summon witnesses or retain counsel for defendants or prisoners. The object of the constitutional provision was merely to secure those rights which by the ancient rules of the common law had been denied to them; but it was not contemplated that this should be done at the expense of the Government. We have no doubt, however, of the power of the court to order a copy of the indictment to be furnished upon the request of the defendant, and at the expense of the Government, and the Government must subpoena witnesses for indigent defendants.³⁰

To be confronted with the witnesses against him.

This is another important provision in the interest of the accused. It would be strange if one charged with an offense should not be permitted to confront—that is, to meet face to face,—those who are to testify against him, to swear away his character, his reputation, his liberty,

³⁰ United States v. Van Duzee, 140 U. S., 169, 173.

and perhaps his life. Such a rule would not only be unjust to the person charged with an offense, but it would be a dangerous innovation upon society, and the State.

In *United States v. Angell*,³¹ it was held this provision was without exception, not if the witnesses can be produced, nor if they are within the jurisdiction, but absolutely on all occasions. If the accused has this right it must be mutual, and exist on the part of the Government. The trial would not be a fair one otherwise. Nor can it be fairly maintained that, if the witness has once been confronted with the accused, before the committing magistrate, that the requirements or guaranties of the Constitution are answered. The deposition of an absent witness taken at an examining trial cannot be read on the final trial, where there is no proof that the witness was absent by the suggestion, connivance or procurement of the accused but it appears that his absence was due to the negligence of the prosecutor.³²

There are, however, at least two notable exceptions to this rule; first, that of dying declarations; second, depositions of witnesses who have died since the former trial.

In *Robertson v. Baldwin*,³³ it was held that the provision that an accused person shall be confronted with the witnesses against him does not prevent the admission of dying declarations, nor the depositions of witnesses who have died since the former trial.

In *Kirby v. United States*,³⁴ the court said. "It is scarcely necessary to say that to the rule that an accused is entitled to be confronted with witnesses against him the admission of dying declarations is an exception which arises from the necessity of the case. This exception was well established before the adoption of the Constitution, and was not intended to be abrogated. The ground upon which such exception rests is that from the circumstances under which dying declarations are made they are equivalent to the evidence of a living witness upon

³¹ 11 Fed. Rep., 43.

³² *Motes v. United States*, 178 U. S., 459-474.

³³ 165 U. S., 275, 282.

³⁴ 174 U. S., 47, 61. *Clyde Mattee v. United States*, 146 U. S., 140, 151.

oath—‘the condition of the party who made them being such that every motive to falsehood must be supposed to have been silenced, and the mind to be impelled by the most powerful considerations to tell the truth.’”

To have compulsory process for obtaining witnesses in his favor.

Compulsory process, within the meaning of this clause, means that the power of the court may be invoked by the defendant to compel the attendance of witnesses who will testify in his behalf. This provision, unlike the preceding provision, was not taken from the common law. It was never a part of the common law. In England in very early times, and down to the seventeenth century, the defendant in a criminal case was not allowed to have witnesses. Subsequently the practice changed and witnesses for the defendant were allowed, but they could not testify under oath. This resulted in the witnesses for the government being believed by the jury rather than those of the accused, because the government's witnesses were sworn, while those of the accused were not. Early in the seventeenth century, being about the year 1620, the House of Commons passed a bill, and it was then passed in the House of Lords, that in all cases covered by *that special act* witnesses for a defendant as well as for the government should be sworn. Later, in the reign of William and Mary, and about the year 1690, another act was passed providing that in cases of *treason* the witnesses should be sworn. A few years later, in the reign of Queen Anne, being about 1700, an act was passed which allowed witnesses to be sworn both for the government and the accused in all cases of felony as well as treason.

The beneficent effect of this act of Parliament, together with the sense of justice and right which must have appealed to every member of the Convention, no doubt secured the introduction of this wise and humane clause into the amendment.

It is the duty of the court, on the application of the prisoner, to send for witnesses, wherever they may be had, within the jurisdiction of the court, if the pris-

oner proves that he is poor, and unable to bear the expense himself.⁵⁵

In *United States v. Cooper*,⁵⁶ the defendant asked the court to address a letter to various members of Congress, that body being then in session, requesting their attendance as witnesses in his behalf, and in support of his application cited a number of cases sustaining that practice in the State of Pennsylvania. Upon deciding his application, Chase, the presiding justice, said:

"The Constitution gives to every man, charged with an offence, the benefit of compulsory process, to secure the attendance of his witnesses. I do not know of any privilege to exempt members of Congress from the service, or obligations, of a *subpoena*, in such cases. I will not sign any letter of the kind proposed. If upon service of a *subpoena*, the members of Congress do not attend, a different question may arise; and it will then be time enough to decide, whether an attachment ought, or ought not, to issue. It is not a necessary consequence of non-attendance, after service of a *subpoena*, that an attachment will issue. A satisfactory reason may appear to the court, to justify or excuse it."

And to have the Assistance of Counsel for his defence.

This provision, like the preceding one, was never a part of the common law. The history of this clause is interesting and instructive to the student of constitutional history. The privilege of the accused to be represented by counsel on his trial seems to have been adopted at different times in different countries. In the days of the Inquisition the accused was denied the right of counsel. In Spain, in the year 1480, Ferdinand and Isabella directed that counsel should be allowed to all who desired them, and that they should be furnished at the expense of the public to those who could not afford to employ them.⁵⁷

⁵⁵ *United States v. Kennelly*, 5 Bissell, 122, 123.

⁵⁶ 4 Dallas, 317.

⁵⁷ Lea's *Superstition and Force*, 460.

The Inquisition was the court or tribunal for examination and punishment of heretics, called, also, the Holy Office. It was fully estab-

Early in the eighteenth century similar privileges were granted in Germany. In England prisoners indicted for treason were first allowed counsel in 1696. The following account given by Macaulay is an interesting recital of an important incident in connection with the passage of the bill allowing counsel to the accused in cases of that character:

"The session had scarcely commenced when the Bill for regulating Trials in cases of High Treason was again laid on the table of the Commons. Of the debates which followed nothing is known except one interesting circumstance which has been preserved by tradition. Among those who supported the bill appeared conspicuous a young Whig of high rank, of ample fortune, and of great abilities which had been assiduously improved by study. This was Anthony Ashley Cooper, Lord Ashley, eldest son of the second Earl of Shaftesbury, and grandson of that renowned politician who had, in the days of Charles the Second, been at one time the most unprincipled of ministers, and at another the most unprincipled of demagogues. Ashley had just been returned to Parliament for the borough of Poole, and was in his twenty-fifth year. In the course of his speech he faltered, stammered, and seemed to lose the thread of his reasoning. The House, then, as now, indulgent to novices, and then, as now, well aware that, on a first appearance, the hesitation which is the effect of modesty and sensibility is quite as promising a sign as volubility of utterance and ease of manner, encouraged him to proceed. 'How can I, Sir,' said the young orator, recovering himself, 'produce a stronger argument in favor of this bill than my own failure? My fortune, my character, my life are not at stake. I am speaking to an audience whose kindness might well inspire me with courage. And yet, from mere nervousness from mere want of practice in addressing large assemblies, I have lost my recollection; I am unable

lished by Pope Gregory about 1235 A. D., and was most active in Italy, Spain and Portugal and their dependencies. When found guilty and contumacious the culprit was handed over to the secular arm to be dealt with according to the laws of the country. It was suppressed in France in 1772, and in Spain finally in 1834. Standard Dictionary of English Language.

to go on with my argument. How helpless, then, must be a poor man who, never having opened his lips in public, is called upon to reply, without a moment's preparation, to the ablest and most experienced advocates in the kingdom, and whose faculties are paralyzed by the thought that, if he fails to convince his hearers, he will in a few hours die on the gallows, and leave beggary and infamy to those who are dearest to him."

"The bill, so often brought in and so often lost, went through the Commons without a division, and was carried up to the Lords. It soon came back with the long disputed clause altering the constitution of the Court of the Lord High Steward."²⁸

In the reign of William IV, from 1820 to 1830, Parliament passed an act permitting counsel to represent the accused in cases of felony. The delay on the part of so great, wise and generous a nation as England to grant this most humane and righteous privilege to one on trial for the commission of a crime is incomprehensible to the student of the English constitution and English history. But to the credit, let it be said, of that country, the failure to grant so reasonable a right was long criticized and even bitterly denounced by many of her lawyers, jurists and writers, and to their efforts was largely due the passage of the act which removed so deep a stain

²⁸ Macaulay's History of England, vol. 7, 274-276.

"It may reasonably be suspected," continues Macaulay, "that Ashley's confusion and the ingenious use which he made of it had been carefully premeditated. His speech, however, made a great impression, and probably raised expectations which were not fulfilled. His health was delicate: his taste was refined even to fastidiousness; he soon left politics to men whose bodies and minds were of coarser texture than his own, gave himself up to mere intellectual luxury, lost himself in the mazes of the old Academic philosophy, and aspired to the glory of reviving the old Academic eloquence. His diction, affected and florid, but often singularly beautiful and melodious, fascinated many young enthusiasts. He had not merely disciples, but worshippers. His life was short: but he lived long enough to become the founder of a new sect of English freethinkers, diametrically opposed in opinions and feelings to that sect of freethinkers of which Hobbes was the oracle. During many years the Characteristics continued to be the Gospel of romantic and sentimental unbelievers, while the Gospel of cold-blooded and hard-headed unbelievers was the Leviathan." Macaulay's History of England, vol. 7, 275.

from the English people and so great a blight from English jurisprudence.

It is a satisfaction to the American student to know the provision was inserted in our Federal Constitution as an amendment long before it was passed as an act by the British Parliament.

CHAPTER LV.

SEVENTH AMENDMENT.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

That in the close of the eighteenth century, a convention of as wise and great men as ever met should have framed a written constitution for the government of a great and intelligent nation, and should have purposely denied in that instrument the right of trial by jury in civil cases, seems one of the most surprising things in the history of modern jurisprudence or constitutional government. And the surprise seems the greater, since some of those who refused to write it in the Constitution, assisted in writing it in the Declaration of Independence as one of the reasons why the Colonies should revolt against the King, "that he has deprived us, in many cases, of the benefits of trial by jury."¹ That the Convention purposely denied the people such a right, is shown by its proceedings. It was moved in the Convention that "a trial by jury should be preserved in civil cases." This was unanimously defeated.² The omission was not, therefore, an accident. It is no wonder the people at once demanded the adoption of an amendment which would correct the error. The wonder is that such a provision was omitted from the original instrument.

The amendment which Mr. Madison introduced in Congress on this subject provided: "But no appeal to such court shall be allowed where the value in controversy shall not amount to \$——: nor shall any fact triable by jury, according to the course of common law, be otherwise re-

¹ Declaration of Independence.

² Journal, 736.

examinable than may consist with the principles of common law," and this he moved to insert in article 3, section 2, as an annex to that clause.³

The Committee of Eleven filled the blank with \$1,000.00 and reported the whole amendment to read: "But no appeal to such court shall be allowed where the value in controversy shall not amount to \$1,000.00; nor shall any fact triable by a jury according to the course of the common law be otherwise re-examinable than according to the rules of the common law."⁴

The special Committee of Three reported the clause in substantially the above form.⁵

The amendment was the occasion of an important debate in Congress and was finally reported as found in the Constitution. Reducing the value in controversy from \$1000.00 to \$20.00 shows the esteem with which Congress regarded the right of trial by jury, and its purpose not to deny this right to litigants in moderate circumstances. The adoption of twenty dollars as the determinate amount was probably purely arbitrary.

Mr. Justice Miller in commenting upon this article remarked:

"The first thing to be observed about this article is that it prescribes this mode of trial in *'suits at common law.'* It does not use the same words as the clause extending the judicial power 'to all cases *in law and equity.*' It is to be inferred, therefore, that trial by jury, as imposed by the Constitution, has relation to the common law as it was understood in England and to the right to such a trial in that class of cases. This distinction may be important in regard to a class of cases where a summary remedy is given by a statute, which is itself a departure from the common law and at variance with it.

"But while the effect given by this article as to a fact tried by a jury has relation to such effect in the courts of the United States, it applies equally to verdicts found by juries in the State courts; that is to say, that in a court of the United States a fact once found by a jury of a State court or of a Federal court shall not be

³ 1 Annals, 452.

⁴ Thorpe's Constitutional History of the U. S., vol. 2, 226.

⁵ Thorpe's Constitutional History of the U. S., vol. 2, 258.

re-examined in any other manner than according to the rules of the common law. This conclusiveness given to the verdict of a jury is in accordance with the common law of England, and is an additional evidence of the sanctity with which the right of trial by jury is held both in that country and this.

“Let it also be observed that this article does not prescribe as an arbitrary rule to the courts that all cases *must* be tried by a jury which are suits at common law and exceed twenty dollars in value, but that it is the *right* of any party to such a suit to have a trial by a jury if he demands it. The parties can waive this right and submit the case to the court without a jury, in which case the judgment of the court would be equally binding as if there had been a verdict of a jury; and in practice in this country, both in the Federal and State courts, a very large proportion of the trials of issues of fact are by the judge or judges of those courts without the aid of a jury. In the Federal courts the consent of all the parties concerned is essential to the validity of this form of trial. Indeed it had been decided prior to the act of Congress of 1865 that there could be no writ of error or appeal to a judgment of an inferior court in a suit at common law in which the parties had submitted the case to the court without a jury, because, as was held by the Supreme Court of the United States, such judgment was in effect but a mere arbitration. But by that statute where the parties waive a jury by a stipulation in writing, the finding of the court upon the facts, which might be either general or special, was to have the same effect as the verdict of a jury, and the judgment might be reviewed by the Supreme Court upon a writ of error or upon appeal, the review extending to the sufficiency of the facts found to support the judgment, and to such exceptions as might have been taken and presented by a bill of exceptions during the progress of the trial.

“The language of this article is that ‘no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.’ The common law admitted of but two modes of re-examining the verdict of a jury. One of these was by a motion for a new trial in the same proceeding,

and usually in the same court in which the verdict was rendered. The other was by some supervisory or appellate court which had jurisdiction upon a writ of error in certain classes of cases to set aside the verdict and grant a new trial.

"These two modes of re-examining a verdict and affirming it or setting it aside proceeded upon somewhat different principles. The court of original jurisdiction, in which the case was tried, had an almost unlimited power of setting aside the verdict for errors of law committed by the court itself during the progress of the trial, for insufficiency of the evidence to sustain the verdict of the jury, and for other causes so numerous and varying that they cannot even be enumerated here; but it may be said that the power of the court in that proceeding, upon a proper showing, to re-examine the verdict, was only governed by a sound legal discretion. The re-examination by an appellate court on a writ of error, or in any other mode by which such a case was carried to a superior court for review, extended only to errors of law committed by the court in the progress of the case, and which were presented by the record and by bills of exception. By this restriction the appellate court was forbidden at common law to enter into an examination of the weight of evidence and the soundness of the verdict of the jury, except as that was affected by some matter of law presented in the course of the trial."⁶

The provision of this amendment, that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, is applicable to the facts tried by a jury in a State court on review in a Federal court.⁷

"It must be taken as established, by virtue of the Seventh Amendment of the Constitution that either party to an action at law in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and

⁶ Miller on the Constitution, 492-496.

⁷ The Justices v. Murray, 9 Wallace, 274-279; Parsons v. Bedford, 3 Peters, 447, 448.

decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England."⁸

The provision of this amendment which secures to every party to a suit, where the value in controversy exceeds twenty dollars the right of trial by jury, does not apply to trials in State courts.⁹

Applies to territorial courts.—The right of jury trial applies however to the courts of the Territories of the United States, as held in *Thompson v. Utah*,¹⁰ where the court said that the provisions of the Constitution relating to the right of trial by jury in suits at common law apply to the Territories of the United States is no longer an open question.

And this had previously been held in *Callan v. Wilson*,¹¹ where Justice Harlan, said: The Seventh Amendment secured to the people of the territories the right of trial by jury in civil actions at common law citing *Webster v. Reid*.¹²

The amendment is susceptible of division into two clauses as follows:

First, In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved.

Second, No fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

We will consider these subdivisions in their numerical order.

In suits at Common Law.—What is meant by suits at common law was considered in *Parsons v. Bedford*,¹³ wherein Judge Story held: "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy. The right to such a trial is, it is believed, incorporated into and secured in every

⁸ *Capital Traction Co. v. Hof*, 174 U. S., 1, 13.

⁹ *Edwards v. Elliott*, 21 Wall., 532, 557.

¹⁰ 170 U. S., 346; *Black v. Jackson*, 177 U. S., 363.

¹¹ 127 U. S., 540, 550.

¹² 11 Howard, 437, 460.

¹³ 3 Peters, 445.

State Constitution in the Union, and it is found in the Constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. As soon as the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Congress; and which received an assent of the people so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. At this time there were no States in the Union, the basis of whose jurisprudence was not essentially that of the common law, in its widest meaning; and probably no States were contemplated, in which it would not exist. The phrase 'common law,' found in this clause, is used in contradistinction to equity, and admiralty, and maritime jurisprudence. . . . It is well known that in civil causes, in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find that the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the third article 'law;' not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit."

In *Shields v. Thomas*,¹⁴ Justice Daniel said: "The language of the Seventh Amendment, 'that suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved,' correctly interpreted, cannot be made to embrace the established, exclusive jurisdiction of courts of equity, nor

¹⁴ 18 Howard, 253, 262.

that which they have exercised as concurrent with courts of law; but should be understood as limited to the rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law, and by the appropriate modes and proceedings of courts of law."

A Jury trial is not a proceeding in Equity.—The right of trial by jury, considered as an absolute right, does not extend to cases of equity jurisdiction. If it be conceded or clearly shown that the case belongs to this class, the trial of questions involved in it belongs to the court itself, no matter what may be its importance or complexity.¹⁵

We have already traced to some extent the history of trial by jury in criminal cases, and as that differs but little from the history of jury trials in civil cases it will be unnecessary to repeat it here. The principal characteristics of a jury trial at common law were that the jury should consist of twelve men, and the verdict should be unanimous and this applied to juries in civil as well as in criminal cases.

A statute of the territory of Utah provided that in civil cases a verdict might be rendered on the concurrence of nine or more members of the jury, but it was held in *American Publishing Company v. Fisher*:¹⁶ "Uniformity was one of the peculiar and essential features of trial by jury at common law, and it is clear that a statute which destroys this substantial and essential feature abridges the right guaranteed by this amendment." This was affirmed in *Springville v. Thomas*,¹⁷ where it was held the Seventh Amendment secured unanimity in verdicts, and an act of Congress could not change it. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case. Everything beyond that is matter of legislative discretion, not of constitutional right.

The language of Chief Justice Waite in the "*Francis Wright*" case was: "The Constitution prohibits a retrial of the facts in suits at common law where one trial has been had by a jury; but in suits in equity or in admiralty

¹⁵ *Barton v. Barbour*, 104 U. S., 126, 133.

¹⁶ 166 U. S., 464.

¹⁷ 166 U. S., 708.

Congress is left free to make such exceptions and regulations in respect to retrials as on the whole may seem best."¹⁸

Whether under the Seventh Amendment a court may inquire whether a judgment founded on a verdict was obtained by fraud, and if so founded may set the verdict aside was a question the Supreme Court of the United States declined to decide.¹⁹

Where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.

There was no special significance in fixing the amount which should entitle a party to a jury trial at twenty dollars. Some amount had to be agreed upon, and the conclusion was most likely reached without debate or comment.

The trial by a jury of twelve men is of very ancient origin, and this may account for the fact that law writers and historians do not agree as to when, nor where, the system was established. A reliable account is that it originated in Scandinavia at a very early period, but that in course of time it was abandoned, and, about 820 A. D., was re-established in that country.²⁰ Almost a century after this the system was established in Normandy, where it was in general use, especially in causes involving small amounts. After the Normans invaded England and overcame that country, which was in 1066, they established their jury system there—substituting it for a system already in force in that country which was called *sectatores*, and which had been established by the Saxons. There is no substantial authority for believing that the number of *sectatores* who sat in a given cause consisted of twelve persons, but that the number varied according to circumstances and the place they sat. They rendered their judgment both upon the law and the facts, and were not sworn to return a true verdict, but were left to their honor to do so.

¹⁸ 105 U. S., 386.

¹⁹ Fidelity Mutual Life Ins. Co. v. Clark, 203 U. S., 65, 73.

²⁰ Reeve's History of English Law, vol. 1, 331. Forsyth, Trial by Jury, 16.

The same historian tells us that the earliest mention of a jury in England was in the reign of William the Conqueror (1066-1087) and that it was a case involving land.

Odo, the Bishop, who presided at the case, being dissatisfied with the determination of the *sectatores*, told them that if they were still of the opinion that they had spoken truly and continued in that opinion, they should choose *twelve* from among themselves, who should confirm it upon their oaths.²¹ And this the historian cites as the first trial which occurred in England by a jury of twelve men. He also tells us that it was in the reign of Henry II (1154-1189), that jury trials became general in England. Hallam, in his Constitutional History,²² refers to the jury system as originating in the reign of Henry II.

Exceptions or challenges to the qualifications of a juror were allowed in those days very much as they are now. There were several causes which the law recognized as being valid challenges to the competency of a juror. Any person who had been convicted of perjury could be challenged, so could any one who held any great enmity against any party, or any special friendship towards either of the parties, so being a servant, or on great familiarity, or related by consanguinity or affinity, unless he was equally related to both parties; being a counsel or advocate. These and other reasons were all regarded as just causes of exceptions to jurors. When the jury was complete, the first one, having been selected, was given this oath: "Hear this, ye Justices, that I will speak the truth of this assise, and of the tenement of which I have had avow by the King's writ, and in nothing will omit to speak the truth, so help me God, and these Holy Gospels." After this oath had been administered the remaining jurors took the following oath. "That oath which the foreman here hath taken I will keep on my part, so help me God, and these Holy Gospels." In this situation, continues the historian, the justices were to say nothing towards instructing the jurors, but the jurors

²¹ Reeve's History of the English Law, vol. 1, 330, 332.

²² Vol. 1, page 21.

were to retire into some secret place, and there to converse with one another with what they had in charge; and no one was to have access to them, or talk with them, until they had given their verdict; nor were they, on the other hand, by signs or words, to give the least intimation what their verdict was to be.

And no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

It is highly probable that this part of the amendment would not have been adopted or presented had it not been for that provision in the original Constitution which provides. "In all other cases before mentioned the Supreme Court shall have appellate jurisdiction both as to law and fact." This provision aroused opposition. Many of its opponents said that it gave the Supreme Court the right practically to retry facts which had been submitted to a jury, and it was the purpose of this part of the amendment to limit the power of the Supreme Court in this regard, though many eminent jurists have thought there was never any danger that the fears of the opponents of the original provision would be realized. The amendment had the effect it was intended to have. It allayed all fear of the Supreme Court on the subject; was influential in overcoming opposition to the Constitution, and assisted in reconciling those who were opposed to it.

How facts may be re-examined.—In *Parsons v. Bedford*, supra, Justice Story, in referring to this clause, said: "It was very important and was a prohibition to the courts of the United States to re-examine any facts tried by a jury in any other manner. The only modes known to the common law to re-examine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo*, by an appellate court, for some error of law which intervened in the proceedings."

According to the rules of the common law.—In *Capital*

Traction Co. v. Hof,²³ Gray, Justice, said: "A comparison of the language of the Seventh Amendment, as finally made part of the Constitution of the United States, with the Declaration of Rights of 1774, with the Ordinance of 1787, with the essays of Mr. Hamilton in 1788 and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment in declaring that 'no fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law,' had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States. This conclusion has been established, and the 'rule of the common law' in this respect clearly stated and defined by judicial decisions.

"It must therefore (p. 13) be taken as established, by virtue of the Seventh Amendment to the Constitution, that either party, to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any Court of the United States."

Trial by jury defined.—"Trial by jury," in the primary and usual sense of the term at common law and of the American Constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer

²³ 174 U. S., 7.

oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.²⁴

In *Guthrie National Bank v. Guthrie*,²⁵ it was held: "A territorial act which created a special commission or

²⁴ *Capital Traction Co. v. Hof*, 174 U. S., 13; *United States v. Reading Railroad Co.*, 123 U. S., 113, 114; *Thompson v. Utah*, 170 U. S., 343.

²⁵ 173 U. S., 528, 535.

Mr. Hamilton contributed to the *Federalist* a defense of the Convention for omitting to provide for jury trials in civil cases, which Judge Story called a "monument of admirable reasoning and exalted patriotism." Story on the Constitution, 541, 5th Edition.

In view of the great ability with which Mr. Hamilton presented his views and the importance of the subject, I quote from him with liberality, though the whole of his article is not inserted:

"The objection to the plan of the Convention, which has met with most success in this State, is relative to *the want of a constitutional provision* for the trial by jury in civil cases. The disingenuous form in which this objection is usually stated, has been repeatedly adverted to and exposed; but continues to be pursued in all the conversations and writings of the opponents of the plan. The mere silence of the Constitution in regard to *civil causes*, is represented as an abolition of the trial by jury; and the declamations to which it has afforded a pretext, are artfully calculated to induce a persuasion that this pretended abolition is complete and universal; extending not only to every species of civil, but even to *criminal causes*. To argue with respect to the latter, would be as vain and fruitless, as to attempt to demonstrate any of those propositions which, by their own internal evidence, force conviction when expressed in language adapted to convey their meaning.

"With regard to civil causes, subtleties almost too contemptible for refutation, having been employed to countenance the surmise, that a thing which is only *not provided for*, is entirely *abolished*. Every man of discernment must at once perceive the wide difference between *silence* and *abolition*. But as the inventors of this fallacy have attempted to support it by certain *legal maxims* of interpretation, which they have perverted from their true meaning, it may not be wholly useless to explore the ground they have taken.

"The maxims on which they rely are of this nature, 'a specification of particulars, is an exclusion of generals;' or, 'the expression of one thing, is the exclusion of another.' Hence, say they, as the Constitution has established the trial by jury in criminal cases, and is silent in respect to civil, this silence is an implied prohibition of trial by jury, in regard to the latter.

tribunal to hear and pass upon claims against a town or city, which have no legal obligation, but which in

"The rules of legal interpretation, are rules of *common sense*, adopted by the courts in the construction of the laws. The true test, therefore, of a just application of them, is its conformity to the source from which they are derived. This being the case, let me ask if it is consistent with common sense to suppose that a provision obliging the Legislative power to commit the trial of criminal causes to juries, is a privation of its right to authorize or permit that mode of trial in other cases? Is it natural to suppose, that a command to do one thing, is a prohibition to the doing of another, which there was a previous power to do, and which is not incompatible with the thing commanded to be done? If such a supposition would be unnatural and unreasonable, it can not be rational to maintain, that an injunction of the trial by jury, in certain cases, is an interdiction of it in others.

"A power to constitute courts, is a power to prescribe the mode of trial; and consequently, if nothing was said in the Constitution on the subject of juries, the Legislature would be at liberty either to adopt that institution, or to let it alone. This discretion, in regard to criminal causes, is abridged by an express injunction; but it is left at large in relation to civil causes, for the very reason that there is a total silence on the subject. The specification of an obligation to try all criminal causes in a particular mode, excludes indeed the obligation of employing the same mode in civil causes, but does not abridge *the power* of the Legislature to appoint that mode, if it should be thought proper. The pretence, therefore, that the National Legislature would not be at liberty to submit all the civil causes of federal cognizance to the determination of juries, is a pretence destitute of all foundation.

"From these observations, this conclusion results, that the trial by jury in civil cases would not be abolished, and that the use attempted to be made of the maxims which have been quoted, is contrary to reason, and therefore inadmissible. Even if these maxims had a precise technical sense, corresponding with the ideas of those who employ them on the present occasion, which however is not the case, they would still be inapplicable to a constitution of government. In relation to such a subject, the natural and obvious sense of its provisions, apart from any technical rules, is the true criterion of construction. . . .

"From what has been said, it must appear unquestionably true, that trial by jury is in no case abolished by the proposed Constitution; and it is equally true, that in those controversies between individuals in which the great body of the people are likely to be interested, that institution will remain precisely in the situation in which it is placed by the State Constitutions. The foundation of this assertion is, that the National Judiciary will have no cognizance of them, and of course they will remain determinable as heretofore by the State courts only, and in the manner which the State Constitutions and laws prescribe. All land causes, except where claims under the grants of different States come into question, and all other controversies between the citizens of the same State, unless where they depend upon positive violations of the Articles of the Union, by acts of the State Legislatures,

equity should be inquired into and if the claims are found to be just to so declare, which, however, does not pre-

will belong exclusively to the jurisdiction of the State tribunals. Add to this, that admiralty causes, and almost all those which are of equity jurisdiction are determinable under our own Government without the intervention of a jury, and the inference from the whole will be, that this institution, as it exists with us at present, can not possibly be affected, to any great extent, by the proposed alteration in our system of government.

"The friends and adversaries of the plan of the Convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury. Or if there is any difference between them, it consists in this; the former regard it as a valuable safeguard to liberty, the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative public, or how much more merit it may be entitled to, as a defence against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty. But I must acknowledge, that I can not readily discern the inseparable connection between the existence of liberty, and the trial by jury in civil cases. Arbitrary impeachments, arbitrary methods of prosecuting pretended offences, arbitrary punishments upon arbitrary convictions, have ever appeared to me the great engines of judicial despotism; and all these have relation to criminal proceedings. The trial by jury in criminal cases, aided by the *habeas corpus* act, seems therefore to be alone concerned in the question. And both of these are provided for in the most ample manner, in the plan of the Convention.

"My convictions are equally strong, that great advantages result from the separation of the equity from the law jurisdiction; and that the causes which belong to the former, would be improperly committed to juries. The great and primary use of a court of equity, is to give relief in *extraordinary cases*, which are *exceptions* to general rules. To unite the jurisdiction of such cases, with the ordinary jurisdiction, must have a tendency to unsettle the general rules, and to subject every case that arises to a *special* determination: while a separation between the jurisdictions has the contrary effect, of rendering one a sentinel over the other, and of keeping each within the expedient limits. Besides this, the circumstances that constitute cases proper for courts of equity, are in many instances so nice and intricate, that they are incompatible with the genius of trials by jury. They require often such long and critical investigation, as would be impracticable to men called occasionally from their occupations, and obliged to decide before they were permitted to return to them. The simplicity and expedition which form the distinguishing characters of this mode of trial require, that the matter to be decided should be reduced to some single and obvious

tend to establish a practice or precedent for the courts, does not infringe the Seventh Amendment as to jury trials."

point; while the litigations usual in chancery, frequently comprehend a long train of minute and independent particulars.

"It is true, that the separation of the equity from the legal jurisdiction, is peculiar to the English system of jurisprudence; the model which has been followed in several of the States. But it is equally true that the trial by jury has been unknown in every instance in which they have been united. And the separation is essential to the preservation of that institution in its pristine purity. The nature of a court of equity will readily permit the extension of its jurisdiction to matters of law, but it is not a little to be suspected, that the attempt to extend the jurisdiction of the courts of law to matters of equity, will not only be unproductive of the advantages which may be derived from courts of chancery, on the plan upon which they are established in this State, but will tend gradually to change the nature of the courts of law and to undermine the trial by jury, by introducing questions too complicated for a decision in that mode. . . .

"I can not but persuade myself on the other hand, that the different lights in which the subject has been placed in the course of these observations, will go far towards removing, in candid minds, the apprehensions they may have entertained on the point. They have tended to show that the security of liberty is materially concerned only in the trial by jury in criminal cases, which is provided for in the most ample manner in the plan of the Convention; that even in far the greatest proportion of civil cases, those in which the great body of the community is interested, that mode of trial will remain in full force, as established in the State Constitutions, untouched and unaffected by the plan of the Convention; that it is in no case abolished by that plan; and that there are great, if not insurmountable, difficulties in the way of making any precise and proper provision for it, in a Constitution for the United States.

"The best judges of the matter will be the least anxious for a constitutional establishment of the trial by jury in civil cases, and will be the most ready to admit, that the changes which are continually happening in the affairs of society, may render a different mode of determining questions of property, preferable in many cases, in which that mode of trial now prevails. For my own part, I acknowledge myself to be convinced that, even in this State, it might be advantageously extended to some cases to which it does not at present apply, and might as advantageously be abridged in others. It is conceded by all reasonable men, that it ought not to obtain in all cases. The examples of innovations which contract its ancient limits, as well in these States as in Great Britain, afford a strong presumption that its former extent has been found inconvenient; and give room to suppose, that future experience may discover the propriety and utility of other exceptions. I suspect it to be impossible in the nature of the thing, to fix the salutary point at which the operation of the institution ought to stop; and this is with me a strong argument for leaving the matter to the discretion of the Legislature." The Federalist, No. 83.

CHAPTER LVI.

EIGHTH AMENDMENT.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

This Amendment consists of three important prohibitions; first, it prohibits the requirement of excessive bail; second, it prohibits the imposition of excessive fines; third, it prohibits the infliction of cruel or unusual punishments. It is strictly of English origin.

The wrongs committed under authority of the Stuarts were so grievous, and the punishments inflicted so severe, that when James II, the last of the Stuart dynasty, abdicated the throne in 1688, and the Prince and Princess of Orange were invited to become King and Queen of England, a Declaration of Rights—which was like a second Magna Charta—was read to them setting forth the wrongs which had been inflicted on the people and praying for release from such persecutions in the future. Among the grants demanded in the Declaration and acceded to by the sovereigns was the following: “Excessive Bail ought not to be required, nor Excessive Fines imposed, nor cruel and unusual Punishments inflicted.”¹ This is the

¹ Cobbett's Parliamentary History, vol. 5, 110.

The grant of the Declaration of Rights was so great an epoch in the civil and political history of Europe, and from it date such momentous interests to the people, that the following account of the opening of the proceedings when the Declaration was read to the King is given.

“February 13, 1688.

“The Declaration of Rights.

“This day, about ten o'clock, Mr. Speaker, attended with the mace, and the House of Commons following him in a body, went in their coaches to Whitehall; where the Right Hon. the Marquis of Halifax, speaker of the House of Lords, being placed on the right side of the door, within the Banqueting-House, and the Right Hon. Henry Powle, esq., speaker of the House of Commons, with the Commons on the

origin of the amendment now under consideration. The language of the two provisions is almost identical, though Bail in general is said to have originated with Magna Charta, in 1214. Within the comprehension of this amendment, bail means giving security or bond by the person arrested for his appearance at a future day. The theory was that the sureties or bondsmen would keep the party within their supervision, and at the required time surrender him to the proper authorities.

In 1444, being the twenty-third year of Henry VI, Parliament passed an act that: "Sheriffs and other officers shall let out of Prison all Manner of Persons upon reasonable Sureties of sufficient Persons, etc."²

This amendment was part of the fourth amendment which Madison introduced,³ and was probably the only one of the amendments introduced by him which was passed in the exact language in which he framed and introduced it. When it was before the House, Mr. Smith objected to the words, "Nor cruel and unusual punishments," as being entirely too indefinite.

Mr. Livermore said: "The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, vil-

left side of the door of the said Banqueting-House; waited the coming of the Prince and Princess of Orange; who, immediately after, entering in at the upper end of the Banqueting-House, came and stood upon the step under the canopy of state; when being placed, the speakers of both houses, together with the Lords and Commons that accompanied them, were brought up by the gentleman-usher of the black-rod, making three obeisances, one at the lower end of the room, one in the middle, and one at the step where their Highnesses stood. And then the speaker of the House of Lords acquainted their Highnesses, that both houses had agreed upon a *Declaration* to be presented to their Highnesses, which he desired might be read; which being granted by their Highnesses, the clerk of the House of Lords, by order of that house read the declaration as followeth." Cobbett's Parliamentary History of England, vol. 5, page 108.

² Cobbett's Parliamentary History, vol. 5, 110.

³ 1 Annals, 452.

lains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."⁴

Excessive bail shall not be required.

The case of *United States v. Lawrence*,⁵ is interesting from an historical and political standpoint, and in its relation to the doctrine of excessive bail in the United States. The defendant, Richard Lawrence, on January 30, 1835, made an assault upon Andrew Jackson, then President of the United States, with intent to murder him. The assault was made by shooting at the President with a pistol as he was coming from the rotunda of the Capitol. Both shots missed fire and no bodily harm was done the President. The assault was proved beyond the possibility of a doubt. The prisoner was arraigned and all the evidence was developed on the trial. After inquiring as to his property and circumstances, the Judge fixed the bail at one thousand dollars, claiming that the offense as proven was not a penitentiary one, as there had been no actual battery, and the defendant did not appear to have any property. It was then suggested by the district attorney, Mr. Key, that it was possible that other persons might have been concerned in the attempt to take the life of the President who would bail the defendant, and then he could make another attempt on the President's life, and suggested that a larger sum ought to be required. The judge replied that there was no evidence produced which would lead to a suspicion that any other person was concerned in the assault, and that the Constitution of the United States prohibited him from requiring excessive

⁴ 1 Annals, 782, 783.

⁵ 4 Cranch, C. C., 518.

bail; and that to require larger bail than the prisoner could give would be excessive bail. He also announced that the discretion of the magistrate in taking bail in a criminal case is to be guided by the compound consideration of the ability of the prisoner to give bail, together with the atrocity of the offence. He thereupon increased the bail to the sum of fifteen hundred dollars.

The word "excessive" is to be considered in relation to the offense committed. To require a person to give bail in a sum beyond his ability would not in all cases violate this provision. The object of the provision is to secure the presence of the accused at the trial. Bail is not required as a punishment for an offense, for it cannot be determined that an offense was committed till after the trial.

The decisions of the State courts on this question are instructive. In Colorado it was held that "excessive bail" would be more than would be reasonably sufficient to prevent evasion of the law by flight or concealment.⁷ So in California the Supreme Court held that "in order to be 'excessive' the bail must be *per se* unreasonably great and clearly disproportionate to the offense involved, or the peculiar circumstances appearing must show it to be so in the particular case," and \$15,000.00 in a case when a person was indicted for assault with intent to commit murder was held not to be excessive.⁸ And the same court held that \$112,000.00 was not excessive bail for ten different felonies, that being the amount the prisoner secured by reason of committing the felonies.⁹

The legislature of Minnesota passed an act under which a railroad and warehouse commission was created which was authorized to fix the rates for the various railroad companies for the carriage of merchandise in that State. The act provided that if this law was violated by a natural person the offender should be punished by a fine not less than \$2500.00, nor more than \$5000.00 for the first offense, and not less than \$5000.00 nor more than \$10,000.00 for each subsequent offense; also that if such carrier or ware-

⁷ In re Losasso, 15 Colorado, 163, 167.

⁸ Ex parte Ryan, 44 Cal. 555-558.

⁹ Ex parte Duncan, 53 Cal., 410.

houseman were a corporation it should forfeit to the State for the first offense not less than \$2500.00, nor more than \$5000.00, and for each subsequent offense not less than \$5000.00 nor more than \$10,000.00, to be recovered in a civil action. It was also provided that any railroad company, or any officer, agent or representative of such company, who should violate any provisions of the act, should be guilty of a felony, and upon conviction should be punished by a fine not exceeding \$5000.00, or by imprisonment in the State prison for a period not exceeding five years, or both such fine and imprisonment.

A case involving the validity of this legislation went to the Supreme Court of the United States, and it was held that the provisions of these acts relative to the enforcement of the rates, either for freight or passengers, by imposing such enormous fines and possible imprisonment, were unconstitutional on their face, without regard to the question of the unfairness of the rates.¹⁰

Nor excessive fines imposed.—A fine which is beyond the power of the accused to pay is an excessive fine. It should be in proportion to the ability to meet it.

The Constitution of Michigan contained a provision that, "Excessive bail shall not be required; excessive fines shall not be imposed, cruel or unusual punishments shall not be inflicted." This provision, as will be seen, is very similar to the amendment under consideration. In *People v. Haug*,¹¹ this provision came under consideration of the supreme court of Michigan. It appeared that the legislature had levied a tax of not less than one hundred, nor more than five hundred dollars on any druggist selling intoxicating liquors contrary to law and imprisonment not less than ninety days, nor more than one year, or both fine and imprisonment on conviction. In case of a second offense the druggist, in addition to other punishment, could be debarred from selling in that State any such liquors for five years. The court, in passing upon the question, said (p. 562): "A druggist, cut off for five years from his business, may suffer a loss of immense sums, and so may any large manufacturer or large dealer, by having his store shut up and his business barred. It not

¹⁰ *Ex parte Young*, 209 U. S., 123, 148.

¹¹ 68 Mich., 549.

only most usually brings about bankruptcy, but it also includes what is meant by an infamous disability,—to receive credit as a surety.

“The Great Charter made it unlawful to impose any penalty or forfeiture which should deprive a man of what is translated his ‘contentment,’ or a person in any kind of business, whether commercial or otherwise, of the means of continuing that business.” The court held that the fine was excessive and the act in violation of the Constitution.

Nor cruel and unusual punishments inflicted.—For more than a century prior to the adoption of our Constitution various forms of torture had been employed in the Colonies and in England in inflicting the death penalty. There is a review of this doleful history in *Done v. The People*,¹² by Campbell, J., from which it appears that in England under the direction of military law the offender was shot. When sentence of death was passed upon him by ecclesiastical tribunals, it was a common thing to burn him at the stake, “as if his priestly judges designed that the heretic, on going out of this world, should have a foretaste of the punishment to which they also consigned him in the next.” For treason the culprit was beheaded with a sword. For other offenses the condemned person was sentenced to be hung, but was taken down while alive, beheaded, disemboweled and quartered; it seldom occurred, however, that punishment other than the execution with an ax was employed. But if in cases of high crime, especially treason, the prisoner would stand mute and refuse to speak or plead he might be sentenced to be pressed to death. This punishment consisted in placing the prisoner on his back, naked, in a cold dungeon, with his arms and legs extended by cords, and with heavy weights laid on his breast, and in that way he was left until death relieved him either from cold or pressure or exhaustion. Later, for the crime of murder and some other offenses, the criminal was sentenced to be hung by the neck until he was dead. It was to prevent such punishments as have been described, except hanging, that the amendment was adopted.

¹² 5 Parker’s Criminal Reports, 364.

The courts and text writers have not always found it an easy matter to determine what constitutes cruel and unusual punishment. A statute, says Judge Cooley, which provides the same punishment for an offense that was provided at common law would hardly be regarded as cruel or unusual. On the other hand, any new offense created by statute could be punished in the same degree and in the same method in which similar offenses were punished by common law. But punishments which tended to degrade a person, and which had become obsolete before the adoption of a constitution either by a State or nation, would most probably be regarded as cruel and unusual, and any punishment which, if ever employed at all, has become altogether obsolete, must certainly be looked upon as unusual.¹³

Usually the term means punishment which would shock the human mind and feeling, like burning, or cutting off the members of the body, or throwing the victim into boiling water.

In *Hobbs v. State*,¹⁴ it is held: "The word 'cruel,' when considered in relation to the time when it found place in a Bill of Rights, meant not a fine or imprisonment, or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel, etc. The word, according to modern interpretation, does not affect legislation providing imprisonment for life or for years, or the death penalty by hanging or electrocution."

In *O'Neill v. Vermont*,¹⁵ Justice Field, in his dissenting opinion, said: "Unusual and cruel punishment is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering. Such punishments were at one time inflicted in England, but they were rendered impossible by the Declaration of Rights, adopted by Parliament on the successful termination of the Revolution of 1688."

Illustrations as to what is not cruel or unusual punish-

¹³ Cooley's Constitutional Limitations, 472, 7th ed.

¹⁴ 133 Indiana, 404, 409.

¹⁵ 144 U. S., 323-339.

ment.—The legislature of Utah passed an act that a person convicted of a capital offense “shall suffer death by being shot, hanged or beheaded, as the court may direct, or shall have his option as to the manner of his execution.” A defendant was convicted of murder and sentenced by the court to be shot until he was dead. It was claimed that this punishment was unusual and in violation of this amendment, but the Supreme Court of the United States, in *Wilkerson v. Utah*,¹⁶ sustained the act, and held that the punishment was not unusual.

Whipping as a punishment for horse stealing has been held not to be a cruel and unusual punishment.¹⁷ So with that penalty for wife beating¹⁸ and with imposing labor on a street for not paying a fine.¹⁹

A statute of Massachusetts provided that “whoever has been twice convicted of crime, sentenced and committed to prison, in this or any other State, or once in this and once at least in any other State, for terms of not less than three years each, shall, upon conviction of a felony committed in this State after the passage of this act, be deemed to be an habitual criminal, and shall be punished by imprisonment in the State prison for twenty-five years.” It was said that the punishment was cruel and unusual, but the Supreme Court of the United States, in *McDonald v. Massachusetts*,²⁰ held otherwise.

For a violation of a local option law a fine of not less than \$300.00 nor more than \$1,000.00, and imprisonment in the county jail for from six to twelve months, or both, such was held in Missouri to be constitutional.²¹

In *Jackson v. United States*,²² the defendant was sentenced to imprisonment at hard labor in the penitentiary for ten years for committing an assault with a dangerous weapon, and it was maintained on trial that this punishment was cruel, unusual and excessive. In dis-

¹⁶ 99 U. S., 130, 137.

¹⁷ *Garcia v. Territory*, 1 New Mex., 415.

¹⁸ *Foote v. Md.*, 59 Md., 264.

¹⁹ *Ex parte Bedell*, 20 Mo. App., 125.

²⁰ 180 U. S., 311, 313.

²¹ *Ex parte Swain*, 96 Mo., 44, 52.

²² 102 Fed. Rep., 473-487, 488.

posing of the case the court said: "The fact that the court imposed the maximum punishment furnishes no ground for the reversal of the case. The extent of the sentence was within the discretion of the judge who tried the case. The general rule is well settled that the sentence and punishment imposed upon the defendant for any violation of the provision of a statute, which is within the punishment provided for by the statute, cannot be regarded as excessive, cruel or unusual. It is true that there may be exceptional cases, in relation to the whipping post, pillory, or other extreme, isolated and exceptional cases where the courts have interfered and held the sentence to be in violation of the provision of the Constitution." The act was sustained (p. 488).

Hanging.—Death by hanging is not an infliction of cruel and unusual punishment.²³

Electrocution.—The Supreme Court of New York held that death by electrocution is unusual, because new, but that court and the Supreme Court of the United States held it was not cruel.²⁴

The case of *Hobbs v. The State*, *supra*,^{24a} arose under the "White Cap Act," passed by the Indiana legislature. This act provided:

"If three or more persons shall unite or combine together for the purpose of doing any unlawful act in the night time, or for the purpose of doing any unlawful act while wearing white caps, masks, or being otherwise disguised, shall," etc.

The defendants were convicted of violating this statute and were fined five dollars each and sentenced to two years in the State prison, and this punishment was claimed to be cruel and unusual. But the court declared otherwise, and asked what could be more "cruel and unusual punishment" than that which the defendant inflicted upon the prosecuting witness.

In the matter of *Isadore Bayard*²⁵ the Supreme Court of New York said: "The courts have rarely had occa-

²³ *Done v. The People*, 5 Parker's Criminal Reports, 382.

²⁴ *In re Kemmler*, 136 U. S., 436, 447. *McIlvaine v. Brush*, 142 U. S., 155, 158.

^{24a} See citation, 14.

²⁵ 25 Hun., 546, 549.

sion to construe the meaning of the phrase 'cruel and unusual punishment.' The text writers, however, have discussed it to some extent, and they seem to understand it as prohibiting any cruel or degrading punishment not known to the common law, and probably, also, those degrading punishments, which in any State had become obsolete when its existing constitution was adopted, and punishments so disproportionate to the offense as to shock the sense of the community." The court sustained the validity of the act of the legislature of New York which authorized the recorder of the city of Cohoes, when any person was brought before him charged with petit larceny, for the first offense, upon conviction of such offender, to punish by fine not exceeding two hundred and fifty dollars, or by imprisonment in the Albany penitentiary at hard labor for a term not exceeding one year, or by both such fine and imprisonment. The recorder sentenced the defendant to one year in the penitentiary for petit larceny, and on review the Supreme Court held, that this punishment was not cruel or unusual.

An interesting case in which the question of cruel and unusual punishment was involved went to the Supreme Court of the United States from Vermont. The Statute of Vermont provided, "If any person by himself, etc., sells, furnishes, or gives away, intoxicating liquor in violation of law, he shall forfeit for each offense to the State, upon the first conviction ten dollars and costs of prosecution; on the second conviction he shall forfeit for each offense twenty dollars and costs of prosecution, and shall also be imprisoned one month; and on the third and subsequent convictions he shall forfeit for each offense twenty dollars for each prosecution, and shall also be imprisoned not less than three months nor more than six months." The statute further provided that "every distinct act of selling" may be proved, and "the court shall impose a fine for each sentence."

A man named O'Neill, a resident of the State of New York, sold and delivered liquor in Vermont contrary to this statute. He was tried before a justice of the peace, who found him guilty and adjudged that he pay to the treasurer of the State a fine of \$9,140, as well as costs of prosecution taxed at \$472.96, and that he be confined

at hard labor in the house of correction at Rutland for one month, and that, in case such fine and costs should not be paid on or before the expiration of the one month's imprisonment, he should be confined at hard labor in the house of correction at Rutland for twenty-eight thousand eight hundred and thirty-six days, to be computed from the expiration of the said term of one month's imprisonment.

O'Neill appealed from the judgment to the county court, where he pleaded not guilty, and a jury trial was had, which resulted in the jury finding him guilty of three hundred and seven offenses. He filed exceptions, and the case went to the Supreme Court of the State. That court affirmed the judgment of the county court, and the case was then taken to the Supreme Court of the United States, where the opinion was delivered by Judge Blatchford.

In the Supreme Court of Vermont O'Neill claimed that the statute under which he was convicted was repugnant to the Eighth Amendment to the Constitution of the United States and also to the constitution of Vermont, as it permitted "cruel and unusual punishments." The opinion in the State court was delivered by Chief Justice Royce. Upon the question that the statute was in violation of the Constitution of Vermont and of the United States, the Chief Justice said:

"The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense with which the respondent, O'Neill, is charged cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed a *great many* offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each offense were inflicted on him, he might be kept in prison for life. The mere fact that accumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offense, the constitutional question might be argued; but here

the unreasonableness is only in the number of offenses which the respondent has committed."

Mr. Justice Blatchford, after quoting the above from the opinion of Chief Justice Royce, said, speaking for a majority of the Supreme Court of the United States: "We forbear the consideration, of this question, because as a federal question, it is not assigned as error, nor even suggested in the brief of the plaintiff in error; and, so far as it is a question arising under the constitution of Vermont, it is not within our province. Moreover, as a federal question, it has always been the rule that the amendment to the Constitution of the United States does not apply to the States."²⁶

From this opinion Mr. Justice Field and Mr. Justice Harlan filed most vigorous dissents, in which Mr. Justice Brewer concurred. In his dissenting opinion Mr. Justice Field said (p. 338):

"The punishment imposed was one exceeding in severity, considering the offences of which the defendant was convicted, anything which I have been able to find in the records of our courts for the present century. By the justice of the peace in Vermont, before whom the defendant was accused, he was convicted of four hundred and fifty-seven distinct offences, and sentenced to pay to the treasurer of the State a fine of \$9,140, and the costs of prosecution, taxed at \$472.96, and be confined at hard labor in the house of correction in the county of Rutland for one month, and, in case the fine and costs should not be paid on or before the expiration of this month's imprisonment, to be confined there at hard labor for the further term of twenty-eight thousand eight hundred and thirty-six days, to be computed from the expiration of the month's imprisonment. This was more than seventy-nine years for selling, furnishing and giving away, as alleged, intoxicating liquor, which took place in New York, to be delivered in Vermont. * * * In the county court he was sentenced to pay a fine of \$6,140 to the Treasurer of the State, and the costs of prosecution, taxed at \$497.96, and stand committed until the sentence was complied with; and in case the fine and

²⁶ O'Neill v. Vermont, 144 U. S., 338, 340.

costs were not paid before the 20th of March, 1883, at three o'clock in the afternoon of that day, to be confined at hard labor in the house of correction for the term of nineteen thousand nine hundred and fourteen days, a period of over fifty-four years, a reduction from the term imposed by the justice of the peace of about twenty-five years.

"Had he been found guilty of burglary or highway robbery, he would have received less punishment than for the offences of which he was convicted. It was six times as great as any court of Vermont would have imposed for manslaughter, forgery or perjury. It was one which, in its severity, considering the offences of which he was convicted, may justly be termed both unusual and cruel. . . . The inhibition of the amendment against cruel or unusual punishments is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportionate to the offences charged. The whole inhibition is against that which is excessive either in the bail required or fine imposed, or punishment inflicted. Fifty-four years confinement at hard labor, away from one's home and relatives, and thereby prevented from giving assistance to them or receiving comfort from them, is a punishment the severity of which, considering the offences, it is hard to believe that any man of right feeling and heart can refrain from shuddering. It is no matter that by accumulative offences, for each of which imprisonment may be lawfully imposed for a short time, the period prescribed by the sentence was reached, the punishment was greatly beyond anything required by any human law for the offences.

"The State may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration. The State has the power to inflict personal chastisement by directing whipping for petty offences—repulsive as such mode of punishment is—and should it, for each offence, inflict twenty stripes it might

not be considered, as applied to a single offence, a severe punishment, but yet, if there had been three hundred and seven offences committed, the number of which the defendant was convicted in this case, and six thousand one hundred and forty stripes were to be inflicted for these accumulative offences, the judgment of mankind would be that the punishment was not only an unusual but a cruel one, and a cry of horror would arise from every civilized and Christian community of the country against it. It does not alter its character as cruel and unusual, that for each distinct offence there is a small punishment, if, when they are brought together and one punishment for the whole is inflicted, it becomes one of excessive severity. And the cruelty of it, in this case, by the imprisonment at hard labor, is further increased by the offences being thus made infamous crimes."

Mr. Justice Harlan, in his dissenting opinion, said (p. 371): "The judgment before us by which the defendant is confined at hard labor in a house of correction for the term of 19,914 days, or fifty-four years and two hundred and four days, inflicts punishment, which, in view of the character of the offences committed, must be deemed cruel and unusual."

In the early case of *Barker v. The People*,²⁷ Spencer, C. J., held in behalf of the court that the disfranchisement of a citizen is not an unusual punishment; it was the consequence of treason and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences.

Death is not cruel within the meaning of the Constitution.—In *In re Kemmler*, *supra*, Fuller, Chief Justice, said (p. 447): "The punishment of death is not cruel within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life. Punishments are cruel when they involve torture or a lingering death."

In *Pervear v. The Commonwealth*,²⁸ it was held that a fine of fifty dollars and imprisonment at hard labor in the house of correction for three months for keeping a

²⁷ 20 Johnson's Reports, 459.

²⁸ 5 Wall., 480.

tenement for the illegal sale and illegal keeping of intoxicating liquors was not a violation of the eighth amendment to the Constitution," as being cruel or unusual punishment.

In the case of *Howard v. Fleming*,²⁹ it was claimed that the sentence was cruel and unusual. Three defendants had been convicted, two were sentenced to ten years and the third to only seven years in prison. Brewer, Justice, in delivering the opinion, said: "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one." It is unnecessary, contended the justice, to attempt to lay down any rule for determining exactly what is necessary to render a punishment cruel and unusual, or under what circumstances this court will interfere with the decision of a State court in respect thereto.

Illustrations of what is cruel and unusual punishment.—

In North Carolina the constitutional provision relative to excessive bail, excessive fines, and cruel or unusual punishment is substantially the same as in the federal amendment. What was an unusual fine came up before the Supreme Court of that State in the case of *State v. Driver*.³⁰ The defendant plead guilty to whipping his wife with a switch with such severity as to leave marks visible on her arms and shoulders for two or three weeks, and that at the end of the whipping he gave her one kick. He was sentenced to five years' imprisonment in the county jail and a recognizance with sureties for five hundred dollars to keep the peace for five years longer. In a petition for release it was claimed that this punishment was cruel and unusual. In delivering the opinion of the court, Reade, J., said: "In *State v. Miller*³¹ the defendant was sentenced to five years imprisonment in the county jail for assault with intent to kill. In that case we stated that the oldest member of this court did not remember an instance where any person had been imprisoned five years in a county jail for any crime, however aggravated, and no instance was cited at the bar in the argument of that case or this, although inquiry was made of the bar of such

²⁹ 191 U. S., 126, 135, 136.

³⁰ 78 N. C., 423, 425, 430.

³¹ 75 N. C., 73, 78.

a term of imprisonment. We have examined our Revised Code, which was prior to our penitentiary system and to our constitution of 1868, when imprisonment was altogether in the county jails, and unless we have inadvertently overlooked some crime, there was none, the punishment whereof was for so long a time. It appears that in clergyable felonies, however aggravated, imprisonment was limited to two years in all cases where the punishment was not specific. . . . It would seem to be clear that what is greater than has ever been prescribed or known or inflicted must be excessive, cruel and unusual. Now, it is true, our terms of imprisonment are much longer, but they are in a penitentiary, where a man may live and be made useful; but a county jail is a close prison where life is soon in jeopardy, and where the prisoner is not only useless, but a heavy public expense. . . . The punishment in this case is not only unusual, but unheard of, and is 'cruel.' It is, therefore, in violation of the Constitution."

Cutting off a Chinaman's queue.—*Ho Ah Kow v. Numan*²² was a case where Ho Ah Kow, who was a subject of the Emperor of China, sued the sheriff of the city and county of San Francisco for damages for cutting off his queue. He alleged in his petition that it is the custom of Chinamen to shave the hair from the front of the head and to wear the remainder of it braided in a queue; that the deprivation of the queue is regarded by the Chinese as a mark of disgrace, and is attended, according to their religious faith, with misfortune and suffering after death; that the defendant knew of this custom and religious faith of the Chinese, and knew also that the plaintiff venerated the custom and held the faith; yet in disregard of plaintiff's rights the defendant inflicted the injury complained of; and that the plaintiff had, in consequence thereof, suffered great mental anguish, been disgraced in the eyes of his friends and relatives, and ostracised from association with his countrymen.

The defendant answered and set forth that he was the sheriff of the county of San Francisco, and had charge of the county jail, that an ordinance passed by the city of San Francisco in pursuance of an act of the legislature

²² 5 Sawyer, 552, 557.

authorizing the city to pass such ordinance, declared that every male person imprisoned in the county jail, under the judgment of any court having jurisdiction in criminal cases in the city and county, should immediately upon his arrival at the jail have the hair of his head "cut or clipped to a uniform length of one inch from the scalp thereof," and the statute makes it the duty of the sheriff to have this provision enforced, and that under this ordinance he did cut off the queue of the plaintiff, who had been committed to prison for not paying a fine for violation of the aforesaid ordinance. The plaintiff denied the validity of the ordinance on the ground that it was special legislation imposing a degrading and cruel punishment upon a class of persons who were entitled, alike with all persons within the jurisdiction of the United States, to the equal protection of the laws.

Mr. Justice Field held that the legislation was special on the part of the supervisors against a class of persons who, under the Constitution and laws of the United States, are entitled to the equal protection of the laws. The ordinance was intended only, said he, for the Chinese in San Francisco. It is known in the community as the "queue ordinance," being so designated from its purpose to reach the queues of the Chinese, and is not enforced against any other persons. The reason advanced for its adoption, and now urged for its continuance, is, that only the dread of the loss of his queue will induce a Chinaman to pay his fine. That is to say, in order to enforce the payment of a fine imposed upon him, it is necessary that torture should be superadded to imprisonment. Then, it is said, the Chinese will not accept the alternative, which the law allows, of working out his fine by his imprisonment, and the State or county will be saved the expense of keeping him during the imprisonment. Probably the bastinado, or the knout, or the thumb screw, or the rack, will accomplish the same end; and no doubt the Chinamen would prefer either of these modes of torture to that which entails upon him disgrace among his countrymen and carries with it the constant dread of misfortune and suffering after death. It is not creditable to the humanity and civilization of our people, much less to their Christianity, that an ordinance of this character

was possible. The complaint in this case says that the ordinance acts with special severity upon Chinese persons, inflicting upon them suffering altogether disproportionate to what would be endured by other prisoners if enforced against them. Upon the Chinese prisoners its enforcement operates as a "cruel and unusual punishment." The ordinance was held to be in violation of the 8th Amendment.

A person was convicted of violating a State statute and forbidden by injunction to do so again. Upon being charged with violating the injunction he was tried and convicted. The court sentenced him to imprisonment and to pay a fine. It was claimed that this was a violation of the Eighth Amendment, but the Supreme Court of the United States held it was not.³³

A statute of a State which provided that any one who embezzled money should, upon conviction, be imprisoned, and also pay a fine equal to double the amount embezzled, which should be a lien on the property of the defendant and collectible as other judgments by legal process, was held not to conflict with the Federal Constitution.³⁴

The Supreme Court of the United States will interfere with the action of the State courts only when they impose fines which amount to a deprivation of property without due process of law.³⁵

³³ *Eilenbecker v. District Court*, 134 U. S., 31, 34.

³⁴ *Coffey v. Harlan County*, 204 U. S., 659, 664.

³⁵ *Waters-Pierce Oil Co. v. Texas*, 212 U. S., 86, 111.

CHAPTER LVII.

THE NINTH, TENTH AND ELEVENTH AMENDMENTS.

NINTH AMENDMENT.

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

This amendment is supposed to have grown out of Mr. Hamilton's contribution on the subject of a general Bill of Rights as set forth in one of his contributions to the *Federalist*.¹ As has been said, the people, when the Constitution was submitted for ratification to the States, were disturbed over the omission of a Bill of Rights in that instrument. Mr. Hamilton in his essay contended that such a bill was not necessary, for various reasons, which have been commented upon elsewhere. It was maintained, however, by those who favored a Bill of Rights that the States were surrendering more power to the General Government under the Constitution than they had under the Articles of Confederation. It was to prevent the exercise by the General Government of rights not granted that the amendment was inserted.

Judge Story says: "This clause was manifestly introduced to prevent any perverse or ingenious misapplication of the well-known maxim, that an affirmation in particular cases implied a negation in all others, and, *e converso*, that a negation in particular cases implies an affirmation in all others. The maxim, rightly understood is perfectly sound and safe; but it has often been strangely forced from its natural meaning into the support of the most dangerous political heresies."²

Paschal says: "The words, 'of certain rights,' have reference to the several general and special powers granted,

¹ The *Federalist*, No. 84.

² Story on the Constitution, vol. 2, sec. 1905.

surrendered or delegated to the different departments of the government." He also says: "The word 'disparage' is strangely used in this connection, and the word 'people' must be used in the sense of 'we the people' in the Preamble, and in the Tenth Amendment."³

The expression 'certain rights' is ambiguous as used in the amendment. Had the rights been enumerated the sense would have been clearer.

Mr. Madison in his Fourth Amendment had the following provision, which contains a remote reference to this amendment: "The exceptions here or elsewhere in the Constitution, made in favor of particular rights, shall not be construed as to diminish the just importance of other rights retained by the people, or as to enlarge the powers delegated by the Constitution; but either as actual limitations of such powers, or as inserted merely for greater caution."⁴

The Committee of Eleven changed it to read: "The enumeration in this Constitution of certain rights, shall not be construed to disparage others retained by the people."⁵

The Special Committee of Three changed this to the form in which it is now found in the Constitution.⁶

TENTH AMENDMENT.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This was the last amendment which Mr. Madison introduced, and its form was not changed, except the words, "or to the people," were added while the amendment was under consideration in the House.⁷ It is one of the most important of the original amendments. It guards the reserved rights of the States, and designates the line of

³ Paschal on Constitution, 268, 269.

⁴ 1 Annals, 452.

⁵ Thorpe's Constitutional History of the United States, vol. 2, 226.

⁶ Thorpe's Constitutional History of the United States, vol. 2, 258.

⁷ 1 Annals, 453.

power between the States and the General Government. The second article of the Articles of Confederation consisted of the following provision, which is probably the source of the amendment: "Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States in Congress assembled." It will be observed that the word "expressly" appears before "delegated" in this provision, but it is omitted in the amendment. When this amendment was being considered in the House of Representatives Mr. Tucker, of Virginia, offered an amendment to prefix to it, "All powers being derived from the people,"² so that it would read, "All powers being derived from the people, the powers not delegated to the United States," etc. Mr. Tucker said he thought this a better place to make this assertion than in the introductory clause of the Constitution, meaning the Preamble. He also embraced in his motion the addition of the word "expressly," so that the amendment would read, "The powers not expressly delegated to the United States by the Constitution," etc.

Mr. Madison objected to the amendment, because, as he said, it was impossible to confine a government to the exercise of express powers, that there must be admitted powers by implication, unless the Constitution descended to recount every minutia. He also said he remembered the word "expressly" had been moved in the Convention of Virginia by the opponents to the Constitution, and after a full and fair discussion had been abandoned by them, and the wording had been permitted to remain in its present form.

Mr. Sherman agreed with Mr. Madison, remarking that corporate bodies are supposed to possess all powers incident to a corporate capacity, without being absolutely expressed. Mr. Tucker replied that he did not view the word "expressly" in the same light as the gentlemen who opposed him. He thought every power to be expressly given which could be clearly understood within any accurate definition of the general power. A vote being taken, Mr. Tucker's motion was defeated.

² Congressional Register, vol. 2, Lloyd, 234.

Mr. Carroll then moved to add at the end of the amendment the words, "or to the people," and this was carried.⁹

In *McCulloch v. Maryland*,¹⁰ Chief Justice Marshall said: "The tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people;' thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves. That this idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language."

A scholarly writer on the Constitution observes "No part of the Constitution has been so often incorrectly quoted as this. The word 'expressly' has been interpolated before the word 'delegated,' and many, perhaps, believe the Constitution to speak of powers *expressly* delegated to the United States. But the word is not in the Constitution, either in this article or in any other. The States, as governments, have delegated nothing. All the power has come from the people. They have delegated to the United States government, and they have delegated to the State governments. The term 'United

⁹ Congressional Register for 1789, 1st Session, 234, 235.

¹⁰ 4 Wheaton, 406.

States,' in this Amendment, means the United States government, and not the people. So 'States' means the State governments."¹¹

In *Metropolitan Bank v. Van Dyke*,¹² Davis, J., in discussing this amendment, held: "The same reservation, in substance, was contained in the second article of the Articles of Confederation, except that the word 'expressly' was there placed before the word 'delegated.' The omission of this word in the tenth amendment is most significant, and shows the object was not to interfere with or restrict any of the powers delegated to the United States by the Constitution, whether expressly delegated or not."

Before the adoption of the Constitution, most if not all the States had constitutions. Under its own constitution each State, as a separate and independent sovereignty, had certain separate and independent powers, which it retained, while it surrendered other powers to the General Government under the Articles of Confederation. When the Constitution was adopted the States surrendered to the General Government, or, to use the language of the Constitution, "delegated to the United States," certain other or greater powers. But only such powers as were delegated to the United States, or were by necessary implication granted to the United States, were surrendered by the States. Such other powers as the States at that time possessed, and such as were not forbidden them by the Constitution, the States reserved to themselves, or to the people.

This distinction has been recognized and sustained by a long line of federal decisions, beginning with the early case of *Calder v. Bull*.¹³

Chase, Justice, in that case, delivering the principal opinion, said (p. 384): "The several State legislatures *retain* all the powers of *legislation*, delegated to them by the State Constitutions; which are not *expressly* taken away by the Constitution of the *United States*. The establishing of courts of justice, the appointment of Judges, and the making regulations for the administration of justice with-

¹¹ Andrews' Manual of the Constitution, 250.

¹² 27 New York, 400, 416.

¹³ 3 Dall., 386.

in each *State*, according to its laws, on all subjects not entrusted to the *Federal Government*, appear to me to be the peculiar and exclusive province, and duty of the *State legislatures*. All the powers delegated by the *people* of the *United States* to the *Federal Government* are defined, and no constructive powers can be exercised by it."

"Both the *States* and the *United States* existed before the Constitution," said Chief Justice Chase, in *Lane County v. Oregon*,¹⁴ "The people, through that instrument, established a more perfect union, by substituting a national government, acting with ample power directly upon the citizens, instead of the confederate government, which acted with powers, greatly restricted, only upon the *States*. But, in many of the Articles of the Constitution, the necessary existence of the *States*, and, within their proper spheres, the independent authority of the *States*, is distinctly recognized. To them nearly the whole charge of interior regulation is committed or left; to them and to the people, all powers not expressly delegated to the *National Government* are reserved."

Chief Justice Taney held:¹⁵ "By the tenth amendment the powers not delegated to the *United States* nor prohibited by it to the *States*, are reserved to the *States* respectively or to the people. The reservation to the *States* respectively can only mean the reservation of the rights of sovereignty which they respectively possessed before the adoption of the Constitution of the *United States* and which they had not parted from by that instrument. And any legislation by Congress beyond the limits of the power delegated, would be trespassing upon the rights of the *States* or the people, and would not be the supreme law of the land, but null and void; and it would be the duty of the courts to declare it so."

In *Collector v. Day*,¹⁶ Nelson, Justice, held: "It is a familiar rule of construction of the Constitution of the Union, that the sovereign powers vested in the *State governments* by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the

¹⁴ 7 Wall., 71, 76.

¹⁵ *Gordon v. United States*, 117 U. S., 697, 705.

¹⁶ 11 Wall., 113, 124.

government of the United States. That the intention of the framers of the Constitution in this respect might not be misunderstood, this rule of interpretation is expressly declared in the tenth article of the amendments. The Government of the United States, therefore, can claim no powers which are not granted to it by the Constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication. The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. The former in its appropriate sphere is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

In *Turner v. Williams*,¹⁷ Justice Brewer, in his concurring opinion, states the principle to be, "While undoubtedly the United States as a nation has all the powers which inhere in any nation, Congress is not authorized in all things to act for the nation, and too little effect has been given to the Tenth Article of the amendments to the Constitution. The powers the people have given to the General Government are named in the Constitution, and all not there named, either expressly or by implication, are reserved to the people and can be exercised only by them, or upon further grant from them."

Again the same Justice in referring to this amendment said: "It disclosed widespread fear that the National Government might, under the pressure of the supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if in the future further powers seemed necessary they should be granted by the people in the manner they had provided for amending that act. The principal factor in this article is 'the people.' The principal purpose of the amendment was not the distribution of power between the United States and the

¹⁷ 194 U. S., 279, 295.

States, but a reservation to the people of all powers not granted. This article is not to be shorn of its meaning by any narrow or technical construction, but it is to be considered fairly and liberally so as to give effect to its scope and meaning."¹⁸

We have now completed our examination of the original amendments. They were the glory and strength of the Constitution. Without them that instrument could not be to the American people what it is.

The subjects which they embrace are so important and so intimately connected with the purposes of the Constitution that it is strange, as has been frequently said, that they were not included in the original instrument. In breadth of conception, in dignity and directness of expression, in the rights they secured, the amendments are worthy of association with the provisions of the original Constitution. Without the promise of them the Constitution could hardly have been adopted, and if it had, it would have failed to secure many of the great purposes for which it was framed. An American statesman, in writing of these amendments, said:

"They were only second in intrinsic importance, on account of the influence their success exerted on the solidity and perpetuity of the new system, to the Constitution itself, and the debates in point of ability and earnestness, particularly on the part of Mr. Madison, not inferior to any of the discussions by which that interesting period when the foundations of the present government were laid was so greatly distinguished; one cannot read them

¹⁸ *Kansas v. Colorado*, 206 U. S., 46, 90.

On the 12th of June, 1823, Mr. Jefferson wrote the following to William Johnson:

"Monticello, June 12, 1823.

"The States supposed that by their tenth amendment, they had secured themselves against constructive powers. They were not lessened yet by Cohen's case, nor aware of the slipperiness of the eels of the law. I ask for no straining of words against the General Government, nor yet against the States. I believe the States can best govern our home concerns, and the General Government our foreign ones. I wish, therefore, to see maintained that wholesome distribution of powers established by the Constitution for the limitation of both; and never to see all offices transferred to Washington, where, further withdrawn from the eyes of the people, they may more secretly be bought and sold as at market." Ford's *Jefferson*, vol. 10, 232, note.

without acknowledging the difficulty of recalling another instance in which a measure of equal gravity was so successfully carried through a public body against the obvious and decided preferences of a large majority of its members, or without admiring the extent to which that success was achieved by the exertions of one man. * * * That Mr. Madison's success in this great measure saved the Constitution from the ordeal of another Federal Convention is a conclusion as certain as any that rests upon a contingency which has not actually occurred, and that it converted the residue of the Anti-Federal party which had not supported the Constitution, whose members, as well as their political predecessors in every stage of our history, constituted a majority of the people, from opponents of that instrument into its warmest friends, and that they and their successors have from that time to the present period, either as Republicans or Democrats, occupied the position of its *bona fide* defenders in the sense in which it was designed to be understood by those who constructed and by those who ratified it, against every attempt to undermine or subvert it, are undeniable facts."¹⁹

These amendments are limitations upon the powers of the Federal Government, and were intended as a Bill of Rights.—These amendments transformed certain great

¹⁹ Van Buren's Political Parties in the U. S., 192-201.

Mr. Bryce believes the omission of the original amendments to the Constitution was of great significance and suggests a new reason why they were omitted. He thinks the framers did not desire uniformity among the States in government or institutions, and that they cared but little to protect the citizens against the abuses of State power, and that their chief aim was to secure the general government against encroachments from the States and to prevent trouble between the central and State authorities. He says:

"These omissions are significant. They show that the framers of the Constitution had no wish to produce uniformity among the States in government or institutions, and little care to protect the citizens against abuses of State power. Their chief aim was to secure the National government against encroachments on the part of the States, and to prevent causes of quarrel both between the central and State authorities and between the several States. The result has, on the whole, justified their action. So far from abusing their power of making themselves unlike one another, the States have tended to be too uniform, and have made fewer experiments in institutions than one could wish." Bryce's *American Commonwealth*, vol. 1, p. 311.

fundamental principles of the common law which were recognized as the foundation of personal liberty and rights into constitutional provisions. These became known together as the Bill of Rights, partly because they were intended to supply the place of a Bill of Rights which the Constitution omitted, and partly because they related to those personal rights and guarantees which are the basis of personal liberty and rights and which should be secured to every person by every organic law. They did not announce new principles of government or establish new guarantees of personal liberty and protection.

In *Robertson v. Baldwin*,²⁰ Mr. Justice Brown said:

"The law is perfectly well settled that the first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well recognized exceptions arising from the necessities of the case."

In the early case of *Fletcher v. Peck*,²¹ decided only twenty years after the first ten amendments were adopted, Marshall, Chief Justice, said: "The Constitution of the United States contains what may be deemed a Bill of Rights for the people of each State."

The doctrine that the amendments were designed as limitations on the powers of the General Government and not on the powers of the States first found judicial sanction in the Supreme Court of New York in 1824, in *Jackson v. Wood*,²² where Walworth, Chief Justice, said: "I am clearly of the opinion that the amendments were never intended to limit the powers of the States, or to control the proceedings of the State Courts."

The first expression of the Federal Judiciary upon this question is in *Bonaparte v. The Camden & Amboy R. R. Co.*,²³ decided in 1830, where Baldwin, Circuit Judge, in discussing the right of a government to take private property for public use, remarked (p. 220): "This principle

²⁰ 165 U. S., 275, 281.

²¹ 6 Cranch, 138.

²² 2 Cowen, 819-821.

²³ 1 Bald. U. S., 205.

of public law is recognized in the fifth amendment to the Constitution of the United States, as to the right and obligation which may be deemed a Bill of Rights for the people of each State. Though it may well be doubted whether as a constitutional provision this applies to the State governments."

The question whether the amendments were meant to be limitations on the States or on the General Government was settled by the United States Supreme Court by the decision of Chief Justice Marshall in *Barron v. The Mayor and City of Baltimore*, in 1833.²⁴ After referring to the adoption of the amendments, Chief Justice Marshall said: "They contained no expression indicating an intention to apply them to the State governments, and this court can not so apply them." From the time of this decision to the present it has been a settled principle that the amendments did not operate as limitations on the powers of the States, but only on those of the Federal Government.

On page 249 in the above case Chief Justice Marshall said:

"Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments; the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented States, and the required improvement would have been made by itself. The unwieldy and cumbersome machinery of procuring a recommendation from two-thirds of Congress, and the assent of three-fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the

²⁴ 7 Peters, 243, 247, 249.

Ambassador Bryce, writing of these amendments, said: "The first ten amendments made immediately after the adoption of the Constitution, ought to be regarded as a supplement or postscript to it rather than as changing it. They constitute what the Americans, following the English precedent, call a Bill of Rights, securing the individual citizen and the States against the encroachments of Federal power." Bryce's *American Commonwealth*, vol. 1, 357.

State governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States by affording the people additional protection from the exercise of power by their own government in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

"But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States, was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

"In compliance with a sentiment thus generally expressed to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments."

In *Fox v. Ohio*,²⁵ it was held:

"The prohibition contained in the amendments to the Constitution, as well as others with which it is associated in those articles, were not designed as limits upon the State governments, in reference to their own citizens. They are exclusively restrictions upon Federal power, intended to prevent interference with the rights of the States, and of their citizens."

Also, in *Withers v. Buckley et al.*,²⁶ the court declared:

"To every person acquainted with the history of the Federal Government, it is familiarly known, that the ten

²⁵ 5 Howard, 410, 434.

²⁶ 20 Howard, 84, 89, 90.

amendments first engrafted upon the Constitution had their origin in the apprehension that in the investment of powers made by that instrument in the Federal Government, the safety of the States and their citizens had not been sufficiently guarded. That from this apprehension arose the chief opposition shown to the adoption of the Constitution. That, in order to remove the cause of this apprehension, and to effect that security which it was feared the original instrument had failed to accomplish, twelve articles of amendment were proposed at the first session of the first Congress, and the ten first articles in the existing series of amendments were adopted and ratified by Congress and by the States, two of the twelve proposed amendments having been rejected. The amendments thus adopted were designed to be modifications of the powers vested in the Federal Government, and their language is susceptible of no other rational, literal, or verbal acceptance."

ELEVENTH AMENDMENT.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

This amendment dates from January 8, 1798, nine years after the establishment of the Government. It was proposed by Mr. Sedgwick, a representative from Massachusetts, but was passed as amended in the Senate, by Albert Gallatin. It was the direct result of the suit of *Chisholm* against Georgia.

Whether a State could be sued in a Federal court seems to have occupied the attention of some statesmen before the ratification of the Constitution. It was urged by the opponents of that instrument that the clause which declared that "the judicial power shall extend to controversies between a State and citizens of another State, and between a State and foreign State, citizens or subjects," authorized the Federal courts to entertain suits brought against a State by citizens of another State, or

citizens of a foreign State. Hamilton undertook to answer these objections in the *Federalist*,²⁷ and said:

"It has been suggested, that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the Federal courts for the amount of those securities. A suggestion which the following considerations prove to be without foundation.

"It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual, *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the Convention it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty, were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State Governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force. They confer no right of action, independent of the sovereign will. To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident that it could not be done, without waging war against the contracting State; and to ascribe to the Federal courts, by mere implication, and in destruction of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable."

The question came up in the Virginia Convention called to ratify the Constitution, and there Patrick Henry and Mr. Mason urged the same objections that had been made

²⁷ The *Federalist*, No. 81.

elsewhere by the opponents of the Constitution. Their arguments were answered by Madison²⁸ and Marshall. Madison said:

"The jurisdiction of the federal courts in controversies between a State and citizens of another State is much objected to, and perhaps without reason. It is not in the power of individuals to call any State into court. The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the federal court. This will give satisfaction to individuals, as it will prevent citizens on whom a State may have a claim being dissatisfied with the State courts. . . . To me it appears that this clause can have no operation but to give a citizen a right to be heard in the federal courts; and if a State shall condescend to be a party, this court may take cognizance of it."

Marshall,²⁹ in meeting the objections, stated:

"With respect to disputes between a *State and the citizens of another State*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a State will be called at the bar of a federal court. . . . It is not rational to suppose that the sovereign power should be dragged before a court. The intent is to enable States to recover claims of individuals residing in other States. . . . But, say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary to be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff."

Notwithstanding the views of Hamilton, and those of Madison and Marshall as expressed in the Virginia Convention, a suit was brought by a citizen of South Carolina against the State of Georgia in 1793, four years after the Government was established, in the Supreme Court of the United States. It was the famous case of *Chisholm v. Georgia*.³⁰ It was held that a citizen of one State could sue another State in the courts of the United States, Jus-

²⁸ 3 Elliot's Debates, 2d Edition, 533.

²⁹ 3 Elliot's Debates, 2d Edition, 555.

³⁰ 2 Dall., 419.

tise Iredell dissenting. At that time all the States were greatly in debt, and as the result of the court's opinion it was feared that holders of obligations against the States would obtain judgment upon them. The decision caused great dissatisfaction and even alarm, which grew as more suits were brought. New York and Maryland were sued on their obligations. The legislature of Georgia showed the greatest hostility to the decision, and passed a bill inflicting the death penalty, without the benefit of clergy, upon any officer or person who would serve a writ in any suit brought by a person against the State of Georgia.⁸¹

The people of Massachusetts were especially aroused because a suit had been commenced against that State as a result of the decision.⁸² Upon receiving the writ the Governor called the legislature together, and that body adopted a resolution stating that "a power claimed or which may be claimed of compelling a State to be made defendant in any court of the United States, at the suit of an individual or individuals, is, in the opinion of this Legislature, unnecessary and inexpedient, and in its exercise dangerous to the peace, safety and independence of the several States and repugnant to the first principles of a Federal Government." The resolution further provided that "The Senators from this State in the Congress of the United States be, and they are hereby instructed, and the Representatives requested to adopt the most speedy and effectual measures in their power to obtain such amendments in the Constitution of the United States as will remove any clause or article of the said Constitution which can be construed to imply or justify a decision that a State is compellable to answer in any suit by an individual or individuals in any court of the United States."⁸³

The decision of the court was announced on February

⁸¹ Hildreth's History of the United States, vol 1, Second Series, 447.

⁸² When service in this case was made upon the Governor and Attorney General the Governor called the Legislature together in special session. Being unable to walk, the Governor was carried to the representative chamber, where he addressed the members of both bodies at length on the subject of the suit.

⁸³ Laws and Resolves of Massachusetts (1792-1793), 591.

18, 1793. On February 20, a resolution which proposed the following amendment to the Constitution was introduced in the Senate:

"The judicial power of the United States shall not extend to any suits in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."²⁴

At the end of a year the resolution was again introduced in the Senate, no action having been taken on it. On its second introduction Albert Gallatin, a Senator from Pennsylvania, offered the following as an amendment:

"The judicial power of the United States, except in cases arising under treaties made under the authority of the United States, shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."²⁵

But this amendment was defeated, and the original amendment passed by a vote of 23 to 2.²⁶ On the day the bill passed the Senate, January 14, 1794, it was brought up in the House of Representatives and referred to the Committee of the Whole, and passed on March 4, after a general debate thereon and after several attempts to amend it had been defeated.²⁷ It was then sent to the Governors of the States and by them submitted to the legislatures for ratification.

When we consider the condition of the country at that early period and the almost universal demand that Congress should adopt and submit an amendment to the States which would relieve the danger of the situation, we learn with surprise that almost three years passed before the legislatures ratified the amendment. But this was finally done, and the announcement to that effect made on January 8, 1798, five years after the decision in *Chisholm v. Georgia* had shocked the country and announced a principle contrary to the opinions of Hamilton, Madison and Marshall on a question of constitu-

²⁴ 2d Congress, Annals, 651.

²⁵ 3d Congress, Annals, 30.

²⁶ Thorpe's Constitutional History, vol. 2, 291.

²⁷ Thorpe's Constitutional History, vol. 2, 291.

tional law. The amendment, as it finally passed, was in the exact language of the one proposed by Senator Gallatin, with the exception that it omitted the words, "except in cases arising under treaties made under the authority of the United States."

In the important case of *United States v. Lee*, Mr. Justice Miller considered the suability of a sovereignty from an historical standpoint and said:

"What were the reasons which forbade that the King should be sued in his own court, and how do they apply to the political body corporate which we call the United States of America? As regards the King, one reason given by the old judges was the absurdity of the King's sending a writ to himself to command the King to appear in the King's court. No such reason exists in our government, as process runs in the name of the President, and may be served on the Attorney-General, as was done in *Chisholm v. Georgia*, 2 Dall. 419. Nor can it be said that the government is degraded by appearing as a defendant in the courts of its own creation, because it is constantly appearing as a party in such courts, and submitting its rights as against the citizen to their judgment.

"Mr. Justice Gray, of the Supreme Court of Massachusetts, in an able and learned opinion which exhausts the sources of information on this subject, says: 'The broader reason is, that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury.' As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests. It seems most probable that it has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every State, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.

"It is obvious that in our system of jurisprudence the principle is as applicable to each of the States as it is to the United States, except in those cases where by the Constitution a State of the Union may be sued in this court.

"That the doctrine met with a doubtful reception in the early history of this court may be seen from the opinions of two of its justices in the case of *Chisholm v. Georgia*, where Mr. Justice Wilson, a member of the Convention which framed the Constitution, after a learned examination of the laws of England and other States and kingdoms, sums up the result by saying: 'We see nothing against, but much in favor of, the jurisdiction of this court over the State of Georgia, a party to this cause.' Mr. Chief Justice Jay also considered the question as affected by the difference between a republican State like ours and a personal sovereign, and held that there is no reason why a State should not be sued, though doubting whether the United States would be subject to the same rule."²⁸

In the case of *Hans v. Louisiana*,²⁹ Mr. Justice Bradley, referring to the decision in *Chisholm v. Georgia*, said (p. 13): "Adhering to the mere letter, it might be so," meaning that adhering to the strict letter of the Constitution as it then was, the decision was probably correct.

Mr. Justice Harlan, in his concurring opinion in the same case, remarked (p. 21): "I am of opinion that the decision in *Chisholm v. Georgia* was based upon a sound interpretation of the Constitution as that instrument then was."

Mr. Justice Bradley said (p. 11): "The amendment, expressing the will of the ultimate sovereignty of the whole country, superior to all legislatures and all courts, actually reversed the decision of the Supreme Court. It did not in terms prohibit suits by individuals against the States, but declared that the Constitution should not be construed to import any power to authorize the bringing of such suits. The language of the amendment is, 'The judicial power of the United States shall not be construed to extend to any suit in law or equity, com-

²⁸ 106 U. S., 196, 206, 207.

²⁹ 134 U. S., 1, 13.

menced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign State.' The Supreme Court had construed the judicial power as extending to such a suit, and its decision was thus overruled. The court so understood the effect of the amendment, for after its adoption, on motion of the Attorney-General of the United States, Mr. Lee, in the case of *Hollingsworth v. Virginia* (3 Dall. 378), submitted to the court the question, 'Whether the amendment did, or did not, supersede all suits depending, as well as prevent the bringing of new suits, against any one of the United States, by citizens of another State,' and on the day succeeding the one on which the question was submitted, the court delivered a unanimous opinion to the effect that, 'the amendment being constitutionally adopted, there could not be exercised any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State.''' The judgment of the court in *Hans v. Louisiana*, as announced by Mr. Justice Bradley, was that a State cannot be sued by one of its own citizens without its consent.

In *Fitts v. McGhee*,⁴⁰ this doctrine was affirmed. Mr. Justice Harlan, speaking for the court, said (p. 524): "It has been adjudged by this court upon full consideration that a suit against a State by one of its own citizens, the State not having consented to be sued, was unknown to and forbidden by the law, as much so as suits against a State by citizens of another State of the Union, or by citizens or subjects of foreign States."

Scope of the amendment.—In *Cohens v. Virginia*,⁴¹ Marshall, Chief Justice, in considering the amendment, decided:

"That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunals of the nation, may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the

⁴⁰ 172 U. S., 516, 524.

⁴¹ 6 Wheaton, 264, 406, 407.

amendment, then, to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its creditors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of a court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

“The first impression made on the mind by this amendment is, that it was intended for those cases, and for those only, in which some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it, but no interest could be felt in so changing the relations between the whole and its parts, as to strip the government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation. The amendment means the judicial power is not to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State.”

Test for determining whether a suit is against a State within the amendment.—In *Tindall v. Wesley*,⁴² it was held that the question whether a particular suit is one against the State, within the meaning of the Constitution, must depend upon the same principles that determine whether a particular suit is one against the United States.

When is a State a party to a suit?—Upon this question the decisions are not harmonious and the earlier judgments or opinions have been modified or overruled. In *Osborn v. Bank of the United States*,⁴³ Chief Justice Marshall said:

⁴² 167 U. S., 204, 213.

⁴³ 9 Wheaton, 738, 857.

"It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record. Consequently, the 11th amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is the party on the record. The amendment has its full effect, if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State or by aliens."

Later, in *Davis v. Gray*,⁴⁴ Mr. Justice Swayne remarked: "In deciding who are parties to the suit the court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action and the State may stand behind him as the real party in interest. A State can be made a party only by shaping the bill expressly with that view, as where individuals or corporations are intended to be put in that relation to the case."

In *Poindexter v. Greenhow*,⁴⁵ Mr. Justice Matthews, for a majority of the court, said: "It is true that the question whether a suit is within the prohibition of the Eleventh Amendment is not always determined by reference to the nominal parties on the record."

In the later case of *In re Ayers*,⁴⁶ Justice Matthews again said, in referring to the language quoted in *Poindexter v. Greenhow*: This, it is true, is not in harmony with what was said by Chief Justice Marshall in *Osborn v. Bank of the United States*.⁴⁷ He then proceeds to say that what was said by Chief Justice Marshall in *Osborn v. Bank* must be taken in connection with its immediate context, and intimates that it is not to be considered as of general application.

In *Chicago v. Dey*,⁴⁸ Mr. Justice Brewer said, after referring to *Osborn v. Bank* and *Davis v. Gray*, that recent cases set aside that rule and establish a more reasonable one—that the Eleventh Amendment covers not only suits brought

⁴⁴ 16 Wall., 203, 220.

⁴⁵ 114 U. S., 270, 287.

⁴⁶ 123 U. S., 443, 487, 488.

⁴⁷ 9 Wheaton, 738, 867.

⁴⁸ 35 Fed. Rep., 869.

against the State by name but those against its officers, agents, and representatives, where the State, though not named as defendant, is the real party against which relief is asked, and the judgment will operate.

In *New Hampshire v. Louisiana*, Chief Justice Waite, speaking of this amendment, said: "The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a State by or for citizens of other States, or aliens, without the consent of the State to be sued, and in our opinion, one State cannot create a controversy with another State, within the meaning of that term as used in the judicial clauses of the Constitution, by assuming the prosecution of debts owing by the other State to its citizens."⁴⁹

The rule seems to be established that a suit brought against the officers of a State is a suit against the State itself, if it is the real party in interest. The interest a State has in the litigation is the test of its suability. If a State could be sued by merely bringing a suit against one of its officers, then, in the language of Mr. Justice Harlan, "The constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former as the executive of the State was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes. That would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law which may be raised by individuals, but it is a mode which cannot be applied to the States of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons."⁵⁰

So a suit for an injunction against the Attorney General of a State was not necessarily a suit against the State.⁵¹

But where purchases are made by officers of a State

⁴⁹ 108 U. S., 76-81.

⁵⁰ *Fitts v. McGhee*, 172 U. S., 516, 530.

⁵¹ *Ex parte Young*, 209 U. S., 123; *Graham v. Folsom*, 200 U. S., 248; *McNeill v. Ry. Co.*, 202 U. S., 543.

for the benefit of a business in which the State is engaged, a suit by the vendors against the officers are suits against the State under this Amendment.⁵²

Difference between the contract of a State with an individual and contracts between individual parties.—In the case of *In re Ayers*, it was held: "It cannot be doubted that the Eleventh Amendment to the Constitution operates to create an important distinction between contracts of a State with individuals and contracts between individual parties. In the case of contracts between individuals, the remedies for their enforcement or breach, in existence at the time they were entered into, are a part of the agreement itself and constitute a substantial part of its obligation. And that obligation cannot be impaired by any subsequent State legislation. * * * It is different with contracts between individuals and a State. * * * The very object and purpose of the Eleventh Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties. It was thought to be neither becoming nor convenient that the several States of the Union, invested with that large residuum of sovereignty which had not been delegated to the United States, should be summoned as defendants to answer the complaints of private persons, whether citizens of other States or aliens, or that the course of their public policy and the administration of their public affairs should be subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interest."⁵³

Where the State is the real party in interest the suit is against it.—"To secure the manifest purposes of the constitutional exemption guaranteed by the Eleventh Amendment," it was said in the same case, "requires that it should be interpreted, not literally and too narrowly, but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit it must be held to cover, not only suits brought against a State by name, but those also against its officers, agents and representatives, where the State, though not named as such, is, nevertheless, the only real party against which

⁵² *Murray v. Distilling Co.*, 213 U. S., 151-169.

⁵³ *In re Ayers*, 123 U. S., 443, 505, 506.

alone in fact the relief is asked, and against which the judgment or decree effectively operates."

In *Prout v. Starr*,⁵⁴ Mr. Justice Shiras said: "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual States from suits by citizens of other States, provided for in the Eleventh Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several States, which forbid the States from entering into any treaty, alliance or confederation, from passing any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other States, or from engaging in war—all of which provisions existed before the adoption of the Eleventh Amendment, which still exist, and which would be nullified and made of no effect, if the judicial power of the United States could not be invoked to protect citizens affected by the passage of State laws disregarding these constitutional limitations."

What is not a suit against a State.—In *Pennoyer v. McConnaughty*,⁵⁵ it appeared that a purchaser of swamp lands under an act of the Oregon General Assembly brought a suit in equity against the Board of Land Commissioners of that State to restrain them from doing certain acts which he alleged were violative of a contract he had with the State at the time he purchased the lands. It was held that this was not a suit against the State within the meaning of this amendment.

In *Ragan v. Farmers' Loan and Trust Company*,⁵⁶ which was an action involving the validity of an act of the General Assembly of Texas creating a railroad commission with power to classify and regulate rates, etc., it was claimed that the State was the real party in interest. Mr. Justice Brewer, for the court, said: "So far from the State being the only real party in interest, and upon

⁵⁴ 188 U. S., 537, 543.

⁵⁵ 140 U. S., 1.

⁵⁶ 154 U. S., 362, 390.

whom alone the judgment effectively operates, it has in a pecuniary sense no interest at all. Going back of all matters of form the only parties pecuniarily affected are the shippers and the carriers, and the only direct pecuniary interest which the State can have arises when it abandons its governmental character and, as an individual, employs the railroad company to carry its property. There is a sense, doubtless, in which it may be said that the State is interested in the question, but only a governmental sense. It is interested in the well being of its citizens, in the just and equal enforcement of all its laws; but such governmental interest is not the pecuniary interest which causes it to bear the burden of an adverse judgment."

In *Howell v. Miller*,⁵⁷ the court decided that where suit was brought to enjoin the publication, etc., of an edition of the laws of a State because it infringed a copyright held under the laws of the United States it was not a suit against the State.

In *Clyde et al. v. Richmond D. & R. Co. et al.*,⁵⁸ Simon-ton, D. J., held that a suit brought by receivers of a railroad against State railroad commissioners, asking for relief against what they claimed were unjust and unreasonable rates for transportation which said commissioners had established, was not a suit against the State within the Eleventh Amendment to the Constitution.

In *Chicago v. Becker et al.*,⁵⁹ where a railroad company was a corporation of one State and brought suit in the Federal court to enjoin railroad commissioners of another State, Justice Brewer held that it was not a suit against the State within the meaning of the Eleventh Amendment.

A suit brought against the members of a railroad commission of a State by a company of a foreign State is not a suit against the State of the commissioners within the Eleventh Amendment.⁶⁰

In *Gunter v. Atlantic Coast Line*, the following maxims were established:

⁵⁷ 91 Fed. Rep., 129, 134, 135.

⁵⁸ 57 Fed. Rep., 436, 437, 438.

⁵⁹ 35 Fed. Rep., 883, 885, 886.

⁶⁰ *Miss. R. R. Commission v. Ills. Cen. R. R. Co.*, 203 U. S., 336, 340.

(1) In view of the prohibitions of the Eleventh Amendment to the Constitution of the United States, a State, without its consent, may not be sued by an individual in a Circuit Court of the United States.

(2) A suit against State officers to enjoin them from enforcing a tax alleged to be in violation of the Constitution of the United States is not a suit against a State within the prohibition of the Eleventh Amendment.

(3) A suit against individuals to prevent them as officers of a State from enforcing an unconstitutional enactment to the injury of the rights of the plaintiff, is not a suit against the State within the meaning of that Amendment.

(4) Although a State may not be sued without its consent, the immunity is a privilege which may be waived. Hence, where a State voluntarily becomes a party to a cause and submits its rights for judicial determination, it will be bound thereby and cannot escape the result of its own voluntary act by invoking the prohibitions of the Eleventh Amendment.⁶¹

Nor is a suit by a citizen of another State brought to restrain a State officer from enforcing a State statute a suit against a State within the Eleventh Amendment.⁶²

From an examination of the cases it appears that the courts have not definitely and finally decided what is a suit against a State. There are many decisions on the subject but the general question is still involved in uncertainty. No fixed, definite test has been established. This uncertainty seems to be recognized by the court itself.⁶³ It would seem that the nature of the case should furnish a proper test.

A constitutional writer has recently said on this subject: "A survey of the cases, and of the reasonings of the courts too painfully discloses the absence of a clear and definite criterion for deciding when a suit is to be deemed a suit against a State. It need not be named as defendant. Its agents or officers may be so far identified with it, that a suit against them will be virtually a suit against it. Whether they are or not, ought not to depend

⁶¹ *Gunter v. Atlantic Coast Line.*, 200 U. S., 273, 283.

⁶² *Scully v. Bird*, 209 U. S., 481-490.

⁶³ *Ex parte Young*, 209 U. S., 123, 168.

on their dignity. There is no valid reason for saying that the governor is the State any more than that the other officers or agents are. The nature of the right contested is a better test. If the State will be deprived of the possession of property which it holds through the defendant, if the plaintiff prevails; if a State statute will be explicitly declared null and its execution by the appropriate officer arrested, if the plaintiff is to succeed, the suit is practically a suit against the State. But neither these criteria, nor any other, can be found consistently enforced in the decisions."⁶⁴

There are two utterances made by two eminent Federal jurists, former members of the Supreme Court of the United States, as a part of their opinions in two great cases, which are inserted here because of their special reference to the first eleven amendments to the Constitution. The first is an extract from the opinion of Mr. Justice Miller in the *Slaughter House Cases*,⁶⁵ in which he said:

"In the early history of the organization of the government, its statesmen seem to have divided on the line which should separate the powers of the National government from those of the State governments, and though this line has never been very well defined in public opinion, such a division has continued from that day to this.

"The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted, shows a prevailing sense of danger at that time from the Federal power. And it cannot be denied that such a jealousy continued to exist with many patriotic men until the breaking out of the late Civil War. It was then discovered that the true danger to the perpetuity of the Union was in the capacity of the State organizations to combine and concentrate all the powers of the State, and of contiguous States, for a determined resistance to the General Government."

The other is from the opinion of Mr. Justice Swayne in *United States v. Rhodes*:⁶⁶

⁶⁴ Prof. William Trickett in *American Law Review*, vol. 41, 383.

⁶⁵ 16 Wallace, 36, 81.

⁶⁶ 1 Abbott U. S., 28-37.

Mr. Madison in his celebrated letter to Judge Roane, dated May 6, 1821, makes the following comment on this amendment:

"The first eleven amendments to the Constitution were intended to limit the powers of the government which it created, and to protect the people of the States. Though earnestly sustained by the friends of the Constitution, they originated in the hostile feelings with which it was regarded by a large portion of the people, and were shaped by the jealous policy which those feelings inspired. The enemies of the Constitution saw many perils of evil in the center, but none elsewhere. They feared tyranny in the head, not anarchy in the members, and they took their measures accordingly. The friends of the Constitution desired to obviate all just grounds of apprehension, and to give repose to the public mind. It was important to unite, as far as possible, the entire people in support of the new system which had been adopted. They felt the necessity of doing all in their

"On the question relating to involuntary submissions of the States to the tribunal of the Supreme Court, the court seems not to have adverted at all to the expository language when the Constitution was adopted, nor to that of the Eleventh Amendment, which may as well import that it was declaratory as that it was restrictive of the meaning of the original text. It seems to be a strange reasoning, also, that would imply that a State, in controversies with its own citizens, might have less of sovereignty than in controversies with foreign individuals, by which the national relations might be affected. Nor is it less to be wondered at that it should have appeared to the court that the dignity of a State was not more compromised by being made a party against a private person than against a co-ordinate party.

"The judicial power of the United States over cases arising under the Constitution must be admitted to be a vital part of the system. But that there are limitations and exceptions to its efficient character, is among the admissions of the court itself. The Eleventh Amendment introduces exceptions, if there were none before. A liberal and steady course of practice can alone reconcile the several provisions of the Constitution literally at variance with each other, of which there is an example in the treaty power and the legislative power on subjects, to which both are extended by the words of the Constitution. It is particularly incumbent, in taking cognizance of cases arising under the Constitution, and in which the laws and rights of the States may be involved, to let the proceedings touch individuals only. Prudence enjoins this, if there were no other motive, in consideration of the impracticability of applying coercion to States." Writings of Madison, vol. 3, 221, 222.

It will be observed that the amendment as finally passed only differs from the original amendment by adding the words "be construed to." This change was made in the Senate on January 2, 1794. 3d Congress Annals, 28.

power to remove every obstacle in the way of its success. The most momentous consequences for good or evil to the country were to follow in the results of the experiment. Hence the spirit of concession which animated the Convention, and hence the adoption of these amendments after the work of the Convention was done and had been approved by the people."

Mr. Tucker in calling attention to this change says, "As part of the history of this clause the original proposition did not contain the words 'be construed to.' Had it been adopted in its original form, it would have been a future limitation to the use of the judicial power. With the insertion of the words 'be construed to' it had retroactive effect by condemning the construction which had been given the original Constitution by the decision in *Chisholm v. Georgia*, when the amendment was called to the attention of the Supreme Court. A number of cases were dismissed from the docket because, by virtue of the amendment, the jurisdiction which had been assumed was taken away." Tucker on the Constitution, Vol. 2, 786.

CHAPTER LVIII.

TWELFTH AMENDMENT.

The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors

appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

The provision which this amendment superseded was in force from the adoption of the Constitution till September 25, 1804, a period of fifteen years, and was as follows:

“The Electors shall meet in their respective States, and vote by Ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President. But in chusing the President, the Votes shall be taken by States, the Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the Person having the greatest Number of Votes of the Electors shall be the Vice-President. But if there should remain two or more who have equal Votes, the Senate shall chuse from them by Ballot the Vice-President.” (Article 2, Section 1, Clause 3.)

The provision of the original Constitution concerning the manner of electing the President and Vice-President was not satisfactory.

The principal opposition to it arose because the electors were required to vote indiscriminately for two persons. The one who received the highest number of votes was to be President, and the one who received the next highest number to be Vice-President, but no elector could designate the person he wished for President or Vice-President. Several amendments were introduced in Congress for the purpose of changing this method and it was while one of these was pending before that body that Madison wrote Jefferson the following letter on the subject, three years before the above amendment was adopted:

“March 15, 1800.

“It is not to be denied that the Constitution might have been properly more full in prescribing the election of President and Vice-President; but the remedy is an amendment to the Constitution, and not a legislative interference. It is evident that this interference ought to be, and was meant to be, as little permitted as possible; it being a principle of the Constitution that the two departments should be independent of each other, and dependent on their constituents only. Should the spirit of the bill be followed up, it is impossible to say how far the choice of the Executive may be drawn out of the constitutional hands and subjected to the management of the Legislature. The danger is the greater, as the Chief Magistrate for the time being may be bribed into the usurpations by so shaping them as to favor his re-election. If this licentiousness in constructive perversions of the Constitution continue to increase we shall soon have to look into our code of laws, and not the charter of the people, for the form, as well as the powers, of our government. Indeed, such an unbridled spirit of construction as has gone forth in sundry instances would bid defiance to any possible parchment securities against usurpation.”¹

This amendment was proposed in 1803 during the first session of the Eighth Congress. It was the contest be-

¹ Writings of Madison, vol. 2, 157.

tween Mr. Jefferson and Mr. Burr for the Presidency in 1800 which led to its adoption. On October 21, 1803, Mr. Clinton introduced in the Senate an amendment relative to the election of President and Vice-President which was debated in that body until December 2, during which time it was amended to read as found in the Constitution. It passed the Senate by a vote of twenty-two to ten.² It then went to the House of Representatives, where a number of amendments were proposed, but none of them were accepted, and on December 8, 1803, that body passed it by a vote of eighty-three yeas to forty-two nays.³ It was ratified the following year by the requisite number of States. Delaware, Connecticut and Massachusetts rejected it as being "unwise, unjust and unconstitutional."⁴

² Annals, 8 Congress, 1 Sess., 16, 203.

³ Annals, 8 Congress, 1 Sess., 775.

⁴ Ames on Amendments, 77, 78.

Gouverneur Morris was a Senator from New York at one time when this Amendment was voted on in the Senate. He cast his vote against it and then wrote the following interesting letter to the President of the New York Senate and Speaker of the Assembly of New York in justification of his vote:

"Washington, December 25th, 1802.

"Sir: On the twenty-fourth of February last I communicated to the Senate of the United States the resolutions, which you did me the honor to transmit. On the third of May a resolution was brought up from the House of Representatives, embracing the latter part of that, which the State of New York had proposed, viz., that in all future elections of President and Vice-President, the persons voted for should be particularly designated, by declaring which is voted for as President and which as Vice-President. On the question, my vote was in the negative; and had it been otherwise, the resolution would have passed.

"Having thus stated the facts, it may not be improper to trouble you with some of the reasons, which governed my decision.

"First, I am opposed to amendments, on the general ground that changing the articles of a constitutional compact lessens that respect for it, which is a main support of free governments.

"Secondly, I am opposed, because it is, generally speaking, better to bear an evil, which we know, than hazard those which we are unacquainted with.

"Thirdly, I am opposed, because the present mode seems preferable to that which is proposed.

"When this article was under consideration in the National Convention it was observed, that every mode of electing the chief magistrate of a powerful nation hitherto adopted is liable to objection. The instances where violence has been used, and murders committed,

In the early days of the republic electors were chosen in various ways. In the presidential election of 1796 the States of Massachusetts, Virginia, Kentucky, North Car-

are numerous; those, in which artifice and fraud have succeeded against the general wish and will, are innumerable. And hence it was inferred, that the mode least favorable to intrigue and corruption, that in which the unbiased voice of the people will be most attended to, and that which is least likely to terminate in violence and usurpation, ought to be adopted. To impress conviction on this subject, the case of Poland was not unaptly cited. Great and ambitious Princes took part in the election of a Polish King. Money, threats, and force were employed; violence, bloodshed, and oppression ensued; and now that country is parcelled out among the neighboring Potentates, one of whom was but a petty Prince two centuries ago.

"The evils, which have been felt in the present mode of election, were pointed out to the Convention; but, after due advisement, the other mode appeared more exceptionable. Indeed, if the present be changed, it might be better to abolish the office of Vice-President, and leave to legislative provision the case of a vacancy in the seat of the first magistrate.

"The Convention was aware, that every species of trick and contrivance would be practiced by the ambitious and unprincipled. It was, therefore, conceived, that if in elections the President and Vice-President were distinctly designated, there would generally be a vote given for one of only two rival Presidents, while there would be numerous candidates for the other office; because he, who wished to become President, would naturally connect himself with some popular man of each particular district, for the sake of his local influence, so that the Vice-President would be but as a bait to catch state gudgeons. The person chosen would have only a partial vote, be perhaps unknown to the greater part of the community, and probably unfit for those duties, which the death of a President might call on him to perform.

"The Convention not only foresaw, that a scene might take place similar to that of the last presidential election, but even supposed it not impossible, that at some time or other a person admirably fitted for the office of President might have an equal vote with one totally unqualified, and that, by the predominance of faction in the House of Representatives, the latter might be preferred. This, which is the greatest supposable evil of the present mode, was calmly examined, and it appeared that, however prejudicial it might be at the present moment, a useful lesson would result from it for the future, to teach contending parties the importance of giving both votes to men fit for the first office.

"This, Sir, is one great object contemplated by the Constitution. Whether it could be obtained by altering the mode of election deserves a serious attention. The other great object is to defeat the fraud, the force, the corruption, which may be used to place bad men in high authority.

"After the most mature reflection of which my mind is capable,

olina, Maryland and Tennessee chose their electors from congressional districts. In 1803 several of the State legislatures passed resolutions advising that method of naming electors, and many of the most prominent men of the country supported the measure. Hamilton declared in favor of it in the Constitutional Convention, and it was through his influence that New York passed resolutions favorable to it. Wilson also favored it. And Gallatin wrote Jefferson: "The most favorable event would certainly be the division of every State into districts for the election of electors." In 1801 Jefferson wrote as follows in support of the plan: "A most favorable event would certainly be the division of every State into districts for the election of electors."

The subject continued to be of great interest to the public and various methods of choosing electors were adopted by different States and by different districts in the same States; some were elected by districts, some by the legislatures and some by what was known as the general ticket plan. In 1824 six States chose their electors through their legislatures and twelve by general ticket. After this election the plan of choosing them by general ticket grew in popularity, and in 1828 an amendment to the Constitution was proposed that they should be named in each State by that plan in order that there might be uniformity throughout the country in such elections.⁵ This amendment failed to pass, but four years later, all the States but two chose their electors in that way, and after that the method was practically adopted by all the States.

The district mode, said Mr. Madison, "was mostly, if not exclusively, in view when the Constitution was framed and adopted, and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular States which had set the example."⁶

I am persuaded that the present mode is preferable to that, which is proposed in lieu of it, and my voice has been given according to my conviction. I have the honor to be, etc.

"Gouverneur Morris."

Sparks' Life of Gouverneur Morris, vol. 3, 173, 176.

⁵ Ames on Amendments, 85.

⁶ On August 23, 1823, Madison wrote George Hay concerning the electors as follows:

The provision that the House of Representatives should choose the President in case no choice was made by the Electoral College was suggested by Mr. Sherman, while the provision that a quorum should consist of the members of two-thirds of the States, was suggested by Mr. King. Mr. Gerry suggested that a majority of States shall be necessary to a choice.

"I agree entirely with you in thinking that the election of presidential electors by districts is an amendment very proper to be brought forward at the same time with that relating to the eventual choice of President by the House of Representatives. The district mode was mostly, if not exclusively, in view when the Constitution was framed and adopted; and was exchanged for the general ticket and the legislative election as the only expedient for baffling the policy of the particular States which had set the example. A constitutional establishment of that mode will doubtless aid in reconciling the smaller States to the other change, which they will regard as a concession on their part. And it may not be without a value in another important respect. The States, when voting for President by general tickets or by their legislatures, are a string of beads; when they make their elections by districts, some of these differing in sentiment from others, and sympathizing with that of districts in other States, they are so knit together as to break the force of those geographical and other noxious parties which might render the repulsive too strong for the cohesive tendencies within the political system.

"It may be worthy of consideration whether, in requiring elections by districts, a discretion might not be conveniently left with the States to allot two members to a single district. It would manifestly be an important proviso that no new arrangement of districts should be made within a certain period previous to an ensuing election of President.

"Of the different remedies you propose for the failure of a majority of electoral votes for any one candidate, I like best that which refers the final choice to a joint vote of the two Houses of Congress, restricted to the two highest names on the electoral lists. It might be a question whether the three instead of the two highest names might not be put within the choice of Congress, inasmuch as it not unfrequently happens that the candidate third on the list of votes would, in a question with either of the two first, outvote him, and, consequently, be the real preference of the voters. But this advantage of opening a wider door and a better chance to merit may be outweighed by an increased difficulty in obtaining a prompt and quiet decision by Congress with three candidates before them, supported by three parties, no one of them making a majority of the whole.

"The mode which you seem to approve, of making a plurality of electoral votes a definite appointment, would have the merit of avoiding the legislative agency in appointing the Executive; but might it not, by multiplying hopes and chances, stimulate intrigue and ex-

Three reasons probably influenced the Convention to refer the election to the House of Representatives, rather than to the Senate, as was provided by the report of the committee on unfinished business. First: The House being the larger body there would be less liability of corrupt or undue influence being used in favor of any particular candidate than in a body where there were fewer members and therefore safer. Second: In consideration of the intimate relations which would necessarily exist between the President and the Senate it was not thought desirable to confer upon the Senate the power of choosing the President. Third: The members of the House of Representatives being elected directly by the people were considered as more nearly representing the sentiment of the people than the Senate.

ertion, as well as incur too great a risk of success to a very inferior candidate? Next to the propriety of having a President the real choice of a majority of his constituents, it is desirable that he should inspire respect and acquiescence by qualifications not suffering too much by comparison.

"I can not but think, also, that there is a strong objection to undistinguishing votes for President and Vice-President, the highest number appointing the former, the next the latter. To say nothing of the different services (except in a rare contingency) which are to be performed by them, occasional transpositions would take place, violating equally the mutual consciousness of the individuals and the public estimate of their comparative fitness.

"Having thus made the remarks to which your communication led with a frankness which I am sure you will not disapprove, whatever errors you may find in them, I will sketch for your consideration a substitute which has occurred to myself for the faulty part of the Constitution in question:

"The electors to be chosen in districts, not more than two in any one district, and the arrangement of the districts not to be alterable within the period of ——— previous to the election of President. Each elector to give two votes, one naming his first choice, the other his next choice. If there be a majority of all the votes on the first list for the same person, he of course to be President; if not, and there be a majority (which may well happen) on the other list for the same person, he then to be the final choice; if there be no such majority on either list, then a choice to be made by joint ballot of the two Houses of Congress from the two names having the greatest number of votes on the two lists taken together.' Such a process would avoid the inconvenience of a second resort to the electors, and furnish a double chance of avoiding an eventual resort to Congress. The same process might be observed in electing the Vice-President." Writings of Madison, vol. 3, 333, 335.

On this subject Mr. Madison wrote: "The difficulty of finding an unexceptionable process for appointing the Executive organ of a Government such as that of the United States was deeply felt by the Convention; and as the final arrangement of it took place in the latter stage of the session, it was not exempt from a degree of the hurrying influence produced by fatigue and impatience in all such bodies, though the degree was much less than usually prevails in them.

"The part of the arrangement which casts the eventual appointment on the House of Representatives voting by States was, as you presume an accommodation to the anxiety of the smaller States for their sovereign equality, and to the jealousy of the larger towards the cumulative functions of the Senate. The agency of the House of Representatives was thought safer, also, than that of the Senate, on account of the greater number of its members. It might, indeed, happen that the event would turn on one or two States having one or two representatives only; but even in that case the representations of most of the States being numerous, the House would present greater obstacles to corruption than the Senate, with its paucity of members. It may be observed, also, that, although for a certain period the evil of State votes given by one or two individuals would be extended by the introduction of new States, it would be rapidly diminished by growing populations within extensive territories. At the present period the evil is at its maximum. Another census will leave none of the States, existing or in embryo, in the numerical rank of Rhode Island and Delaware; nor is it impossible that the progressive assimilation of local institutions, laws and manners, may overcome the prejudices of those particular States against an incorporation with their neighbors.

"But with all possible abatements, the present rule of voting for President by the House of Representatives is so great a departure from the Republican principle of numerical equality, and even from the Federal rule, which qualifies the numerical by a State equality, and is so pregnant, also, with a mischievous tendency in practice, that an amendment of the Constitution on this point is justly called for by all its considerate and best friends."

¹ Writings of Madison, vol. 3, 332-333.

The term "electors" was first used in the Convention by Mr. Hamilton, when he proposed that the Governor—that was Hamilton's term for President—should be elected by "electors chosen by the people." There is some degree of uncertainty concerning the term, and why it was used. A forceful writer has suggested that the framers of the Constitution feared the election of the President by the people and for that reason chose the method of electing him by electors.

The word "elector," says the author, "is one of great historical meaning and interest, on account of the remarkable coincidence of the establishment of electoral colleges in the States, and the existence in past ages of intermediate bodies, called together for the purpose of choosing a chief magistrate. It had been the prevailing custom, sanctioned by time, to devolve this duty upon a small and select body of men. We know that the Polish Diet elected the King of Poland; that the Emperor of Germany was chosen under the Germanic constitution by an electoral college, and that the choosing of the Supreme Pontiff of the Christian world has, from time immemorial, fallen upon a small body of men.

"Hereditary monarchy had no charms for the sturdy heroes and the statesmen of the Revolution, but the same heroes and statesmen, as framers of the Constitution, would not tolerate the idea of allowing the entire population to take a direct part in the election.

"From the pages of history, they had learned that in the ancient republics of Greece and Rome, tumults, riots, and widespread disorder had followed in the train of popular elections. They also feared that the people would not only be unable to discriminate in the character and qualifications of the candidates, but would be influenced and controlled in their choice by powerfully organized societies. A prediction was made by a member of the Federal Convention, that in a direct vote by the people, the Order of the Cincinnati would practically make the choice. This apparent want of confidence in the intelligence of the people was, however, shared by few; for some of the most bitter opponents of a popular election were considered in their own States to be most extreme in advocacy of popular rights.

"The real obstacle was the dread of consolidation, which swayed the minds and biased the opinions of almost all the local politicians, and especially had sunk deeply into the hearts of the people."

Another author attributes the origin of the term and its adoption by the Convention to the fact that prior to the adoption of the Constitution several of the States elected their Governors directly by the people, while the remaining States elected theirs by the general assembly, saying that to avoid either of these methods the Convention adopted the electoral system as a compromise.⁹

Whatever may have been the motive which influenced the Convention to provide for electing the President and Vice-President by electors, the original function of the electoral college was abandoned soon after the establishment of the Government.

Under the original clause of the Constitution each elector voted for two persons, but did not vote for either of them for President or Vice-President, but the person who received the greatest number of votes, if the number was a majority of all the electors appointed, would be President, by virtue of the constitutional provision. If more than one person had a majority of the electoral vote and an equal number of votes, then the House of Representatives immediately chose one of them President by ballot. If no person had a majority of the votes of all the electors, then the House of Representatives chose the President from the five having the highest vote. The vote was by States, each State having one vote. A quorum consisted of a member or members from two-thirds of the States, and a majority of all the States was necessary to a choice. After the President was elected the person having the

⁸ O'Neil, Electoral System, 3.

⁹ Johnson in New Princeton Review, September, 1887, 180, 181.

"The fact that the election of the President is left to a body of men chosen 'for the special purpose,' and 'at a particular conjuncture' is the striking characteristic of the system. Two European potentates, the German Emperor and the Pope, were at the time of the Convention elected by small bodies of men, in one case even called 'electors.' Sir Henry Maine thinks that the members of the Convention 'were to a considerable extent guided' by the example of the Holy Roman Empire. 'The American republican electors,' he goes so far as to say, 'are the German imperial electors, except they are chosen by the several States.'" Stevens, Sources of the Constitution, 153, note.

greatest number of votes was to be the Vice-President. If two or more persons had an equal number of votes, the Senate was to choose a Vice-President from them by ballot. But this was changed by the present amendment.

Under this amendment each elector votes directly by ballot for President and Vice-President. The person who receives the greatest number of votes for President, if such number be a majority of the whole number of electors appointed, is President, but if no person has a majority, then the House of Representatives immediately chooses the President by ballot from the three persons having the highest number of votes for President. In such a case, the vote is taken by States as it was under the original provision, and each State has only one vote. A quorum consists of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice.

If the election of a President should devolve upon the House of Representatives as now constituted, it would be governed as follows:

Forty-six States are represented in that body, consequently thirty-one constitute a quorum, but twenty-four being a majority of all the States, that number of representatives can elect the President. If the House of Representatives fails to choose a President before the fourth day of March following, the Vice-President shall act as President.

The person having the greatest number of votes for Vice-President shall be the Vice-President, if his vote is a majority of all the electors appointed; and if no person has such majority then the Senate shall elect the Vice-President from the two highest numbers on the list. A quorum for this purpose shall consist of two-thirds of the whole number of the Senators, and a majority of the whole number shall be necessary to a choice. Under this rule, if the election of a Vice-President is thrown into the Senate as now constituted, the proceedings will be as follows: There are ninety-two members of the Senate; sixty-two, being two-thirds of that number, would be necessary to constitute a quorum; and forty-seven Senators, being a majority of the whole number, would be necessary to elect. So that if the election of a President should be thrown

into the House of Representatives and that of a Vice-President into the Senate, it would require twice as many votes to elect a Vice-President as a President.

There is much similarity in the two plans, the chief difference being that under the original provision electors did not vote directly for President and Vice-President, while under the amendment they do. Another difference is that should the House of Representatives choose the President, its choice under the old provision must have come from the *five* candidates receiving the highest number of votes, while under the amendment, it must choose from the *three* having the highest vote.

The provision in the Constitution that "if there be more than one who have such majority, and have an equal number of votes," is omitted in the amendment.

Under the Constitution the House chose the President, first, when more than one person had a majority of the Electoral College and had an equal number of votes; second, when no person had a majority of the Electoral College.

Under the first of these contingencies the House was limited in its choice to those persons having an equal number of votes.

In the second contingency it was limited to the five highest on the list.

Under the amendment the House elects the President only when no person has a majority of the Electoral College.

Jefferson and Burr had an equal number of votes in the Electoral College, consequently the election of the President, went to the House of Representatives and that body was limited in its choice to those two.

No special reason seems to have been assigned why the House of Representatives should choose the President from the "five highest on the list" in case the choice of the President was referred to that body. Nor does there seem to be any special reason why the amendment reduced the number from which the selection should be made from five to three. Probably the selection in each instance was largely arbitrary as some number had to be agreed upon. When the Convention selected five as the number it does not appear to have provoked criticism, though reducing it in the amendment to three occasioned some discussion.¹⁰

¹⁰ When the amendment was pending in the Senate Senator John

Under the original provision the Senate chose the Vice-President by ballot, while the amendment simply says the Senate shall choose the Vice-President, without prescribing the manner in which it shall be done.

There is nothing in the Constitution requiring the members of the Electoral College to elect any particular person President or Vice-President. They are free to elect any eligible man to either of these positions, but it is not so in the

Quincy Adams objected to the number three being substituted for five, and wished the latter number restored, saying the House of Representatives had already agreed to it. A motion was made and passed to strike out three, then a motion was made to fill the blank with five, but this failed; then upon the motion of Mr. Smith the blank was filled with three. *Annals*, 8th Congress, 1st Session, 84, 85.

When the amendment was pending in the House of Representatives, Mr. Gregg, in speaking upon it, said:

"We sent a resolution to the Senate in which we declared that, in case no choice should be made by the electors, a President should be chosen from the five persons highest on the list. The Senate have not adopted this, but sent down to us the number three. Without attending at this time to verbal criticism, or adverting to the extreme ambiguity of the sentence which contains the number or numbers of persons, or the classes of persons, out of which the House of Representatives are to choose, in case no election is made by the electors; I will only say, that whether *three* in that sentence is made to refer to persons, or to classes of persons, highest on the list, it is, in either view, the most objectionable *number* which the Senate could have selected.

"But I conceive the number was adopted by the framers of the Constitution as the least exceptionable to the States in general, when connected with the present mode of voting for President and Vice-President without designation. According to that mode of election, three persons might have each a majority of the votes of all the electors, and if the whole number of votes be an equal number (which will be the case at the next election), four persons might divide the votes equally, each having within one of a majority of the whole number of electors appointed; and this is a case that might have been considered as likely to take place, upon the supposition that two persons would be nominated and voted for by one political party, and two other persons by the opposite party; therefore, less than the four highest on the list could not with any reason have been adopted, from whom this House should choose the President in case no election was made by the electors; and the framers of the Constitution thought it advisable to add one to this number, making it the five highest on the list, conceiving, in all probability, that this would have an effect to prevent an equality of electoral votes being given for different persons, and thereby be more likely to produce an election by the electors." *Annals*, 8th Congress, 1st Sess., 715, 724.

event the election of a President goes to the House of Representatives, or of a Vice-President to the Senate. In that case the members of the House *must* elect as President one of the *three* candidates who received the highest number of votes for that office in the Electoral College, and the Senate *must* elect the Vice-President from the *two* candidates having the highest number of votes on the list for that office.

Up to the time the election is sent to the House of Representatives, the Electoral College can elect any native American citizen President, but the moment that is done the amendment precludes every such person from consideration, except the three highest, as the old Constitution precluded all but the five highest, thus constituting an absolute bar to the election of any native citizen, however eminent his qualifications and fitness. Why this limitation should have been placed upon the House of Representatives and the Senate in the choice of President and Vice-President, the Constitution does not explain.

The electors are those persons elected in each State to cast the vote of the State for President and Vice-President, and their only function is to cast, certify and transmit the vote of the State. Each State is entitled to as many electors as it has Senators and members of the House of Representatives. They are elected by the voters of each State on the same day on which the people vote for President and Vice-President. The Constitution does not prescribe any qualifications for an elector. But it provides that neither a Senator nor a Representative in Congress, nor any person holding an office of trust or profit under the United States shall be an elector. These are the only persons whom the Constitution disqualifies from holding this position. But an elector must have the qualifications of a voter under the State statute.¹¹

The electors are not officers of the United States, though they are appointed or elected under and in pursuance of the Constitution. Congress has not undertaken to interfere with the election or appointment of electors, but has left such matters to State control and the State courts have jurisdiction of an indictment for illegal voting for Presidential electors.¹²

¹¹ Pope v. Williams, 193 U. S., 621, 633.

¹² In re Green, 134 U. S., 377, 379.

One author¹³ says: "The legislature of the Commonwealth might order the election of the electors by universal suffrage or by a restricted suffrage, directly or indirectly, by district ticket or general ticket, by single or cumulative vote; or it might authorize the executive of the commonwealth to appoint them; or it might choose them itself; or cause them to be selected by any person and in any manner which it might deem suitable. It may, and it alone, can direct how a disputed election of the electors or any one of them shall be determined. It may, and it alone can, determine the qualifications of the electors, outside of the one qualification prescribed by the Constitution, viz., that they shall hold no office of trust or profit under the United States."

In *McPherson v. Blacker*¹⁴ the question of the election of electors was considered in an opinion by Chief Justice Fuller in a case growing out of the act of the Legislature of Michigan which authorized the choice of electors in that State by congressional districts. The court held that under the second clause of article two of the Constitution, the legislatures of the States have exclusive power to direct the manner in which the electors of President and Vice-President shall be appointed. Such appointment may be made by the legislature directly, or by popular vote in districts, or by general ticket, as the legislature may see fit to provide.

Three Presidential elections were held under the original provision of the Constitution governing the manner of electing the President. At the first election, in 1788, there were sixty-nine electors, each of whom was entitled to vote for two persons. All voted for Washington, and he was, therefore, under the provisions of the Constitution, elected President. After this Mr. Adams, having received thirty-four votes, the greatest number of any person after Washington, was by the terms of the Constitution elected Vice-President. The original Constitution very singularly did not require, as it did with reference to the President, and as the amendment does, that the *Vice-President* should receive a *majority* of the electoral votes, but provided that after the choice of the President, the

¹³ Burgess, Constitutional Law, vol. 2, 216.

¹⁴ 146 U. S., 1, 27.

person receiving the "greatest number of votes of the electors should be *Vice-President*."¹⁵ At the second election, in 1792, there were one hundred and thirty-two electors, each of whom was entitled to vote for two persons, and each of whom voted for Washington, and this elected him President a second time. Seventy-seven of the electors voted for Mr. Adams, and this elected him Vice-President a second time. At the third election, in 1796, there were one hundred and thirty-nine electors, a majority of whom voted for Mr. Adams, and this elected him President; after this Mr. Jefferson, having received the greatest number of votes, was elected Vice-President. At the fourth election, in 1800, there were one hundred and thirty-eight electors, an equal number of whom voted for Mr. Jefferson and Mr. Burr, giving each a majority of the electors. This threw the election for President into the House of Representatives. There were sixteen States, and each State had one vote. Eight of them voted for Mr. Jefferson, six for Mr. Burr, and two were divided in their vote. They continued to vote in this way for thirty-five ballots. On the thirty-sixth ballot Mr. Jefferson received the requisite number of votes and was elected President and Mr. Burr Vice-President.¹⁶

¹⁵ Art. 2, sec. 1, clause 3, Constitution.

¹⁶ The manner of electing the President of the United States was a subject of very grave consideration in the Convention which framed the Constitution, and several propositions which had apparently at one time the sanction of a majority of that body were changed and modified before the final adoption of the rule here stated as originally adopted, and as it now exists, it was supposed that the body of electors interposed between the State legislatures and the presidential office would exercise a reasonable independence and fair judgment in the selection of the chief executive of the National Government, and that thus the evil of a President selected by immediate popular suffrage on the one side and the opposite evil of an election by the direct vote of the States in their legislative bodies on the other, would both be avoided. A very short experience, however, demonstrated that the electors, whether chosen by the legislatures of the States, as they were originally, or by the popular suffrage of each State, as they have come to be now, or by limited districts in each State, as was at one time the prevailing system, are always but the puppets selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power, whether that was the legislature, or the more popular suffrage by which the legislature itself was elected. So that it has come to pass that the curious ma-

The language, "The President of the Senate shall in the presence of the Senate and the House of Representatives open all the certificates and the vote shall then be counted," has been the subject of much passionate controversy. It does not seem to have occurred to the framers of the Constitution that this language was susceptible of different constructions and might lead to a dangerous condition in the political affairs of the nation. A serious situation arose on account of this provision at the second election of Mr. Monroe in 1821, growing out of the counting of the electoral vote of the State of Missouri. The fact that the counting or not counting the vote would make no difference in the final result probably avoided grave trouble.

The question again arose in a more aggravating and dangerous form as the result of the presidential election in 1876, when Mr. Hayes and Mr. Tilden were candidates for the Presidency. There were different sets of certificates for the Electoral Colleges in several States. The important question was who should open the certificates and count the votes? The Senators were largely of Mr. Hayes' political party and were favorable to him, while in the House of Representatives, Mr. Tilden's friends were in the majority and were favorable to him. The friends of Mr. Hayes maintained that it was the right and duty of the President of the Senate to open the certificates and count the votes while the friends of Mr. Tilden maintained that the action of the President of the Senate was only ministerial and that the two houses in joint session should count the votes.

It was largely this disagreement between the members of the Senate and of the House and the acrimonious feeling which was developed which led to the passage by Congress of the bill known as "The Electoral Commission Bill." The commission created under the provisions of this bill had power to examine the various certificates and decide upon their validity, but the finding

chinery is only a mode of casting the vote, to which a State is entitled in the election of President, in favor of that candidate who is the favorite of the majority of the people, entitled to vote for the more popular branch of the State legislature in each State." Miller on the Constitution, 149, 150.

of the commission could be set aside by the concurrent vote of the two houses. The commission, as is well known, decided in favor of Mr. Hayes by a vote of eight to seven and he was accordingly declared to have been elected President. No concurrent vote was ever obtained by which the decision of the commission could be set aside. It was doubtful whether Congress had the power to create such a commission; but the result was accepted by the country and what might have been a most serious conflict was thus avoided.

The counting of the electoral votes is now regulated by statute.¹⁷ The act, among other things provides that "the Senate and the House of Representatives shall meet in the hall of the House; that two tellers shall be appointed on the part of the House, that the President of the Senate shall preside and he shall open the certificates and hand them to the tellers." The certificates are then acted upon in alphabetical order and the tellers make a list of the counts from the certificates. The votes having been counted by the tellers the result is given to the President of the Senate who thereupon announces the state of the vote.¹⁸

¹⁷ Act of Feby. 3, 1887, 24 Stat. L., 373.

¹⁸ The resolution adopted by the Constitutional Convention which directed that the Constitution be transmitted to Congress contained this provision, "*That the Senators should appoint a President of the Senate, for the sole purpose of receiving, opening and counting the votes for President.*" Hickey on the Constitution, 257.

The following is an account of the first counting of the votes of the Electoral College for President and Vice-President.

"Monday, April 6.

"Richard Henry Lee, from Virginia, then appearing took his seat, and formed a quorum of the whole Senators of the United States.

"The credentials of the members present being read and ordered to be filed, the Senate proceeded, by ballot, to the choice of a President, for the sole purpose of opening and counting the votes for President of the United States.

"John Langdon was elected.

"Ordered, That Mr. Ellsworth inform the House of Representatives that a quorum of the Senate is formed; that a President is elected for the sole purpose of opening the certificates, and counting the votes of the electors of the several States in the choice of a President and Vice-President of the United States; and that the Senate is now ready, in the Senate chamber, to proceed, in the presence of the House, to discharge that duty; and that the Senate have appointed one

We have seen that the manner of electing the President was one of the most difficult questions which came before the Convention, and that great difference of opinion existed on the subject. The provision for electing the President by electors was a compromise. It was intended that the electors should be an independent body, who would exercise their best judgment in the election of a President, free from individual or legislative influence; and it was hoped in this way to avoid the evil of electing a President by direct popular vote of the people, and also to avoid the opposite evil of electing him by the vote of the individual States through their legislative bodies. Party organizations were not then recognized as influential factors in national elections. National conventions for nominating candidates for President and Vice-President were not contemplated by the Constitution. It was the evident purpose of the framers of the Constitution to keep the election of President as far as possible from the direct influence of politics, and it was thought this would be accomplished by the electoral system. The system is still faulty, but it is doubtful if one could be devised which would not be subject to serious objection. The plainest and simplest way of electing the President would be by a direct vote of the people, as the Executives of the States are elected, but Congress has never proposed an amendment to the Constitution embodying such a method.

The power of the Electoral College—as the electors have long been called—began to lessen with the development of party politics soon after the election of John Adams to the Presidency. Neither Washington nor Adams

of their members to sit at the clerk's table to make a list of the votes as they shall be declared; submitting it to the wisdom of the House to appoint one or more of their members for the like purpose.

“Mr. Ellsworth reported that he had delivered the message; and Mr. Boudinot, from the House of Representatives, informed the Senate that the House is ready forthwith to meet them, to attend the opening and counting of the votes of the electors of the President and Vice-President of the United States.

“The speaker and the members of the House of Representatives, attended in the Senate chamber; and the President elected for the purpose of counting the votes, declared that the Senate and House of Representatives had met, and that he, in their presence, had opened and counted the votes of the electors for President and Vice-President of the United States.” 1 Annals, 16, 17.

was nominated in advance by caucus, or party, as a candidate for President or Vice-President, nor was either of their names printed or written on any ballot as a candidate. The electors met and voted for two persons, the one receiving the highest number of votes to be President and the other Vice-President. With the election of Adams for President this method ceased, and the power of the Electoral College began to wane.

Of the decline of the Electoral College President Roosevelt says:

"As a matter of fact the functions of the electorate have now by time and custom become of little more importance than those of so many letter carriers. They deliver the electoral votes of their States just as a letter carrier delivers his mail."¹⁹

The Caucus.—It was during the administration of President John Adams that party lines began to form and party discipline began to exert itself and the party caucus became a potential agency in the selection of candidates for the two highest positions in the Republic. It is difficult to determine with accuracy the exact time when the caucus system was inaugurated, but students of our political history know that the friends of Mr. Jefferson, who were then members of Congress, held a caucus, and as the result announced him as their candidate for the Presidency, and he was the first ever to be so announced. The caucus at that time was composed wholly of members of Congress, it being then regarded as a prerogative of Congressmen to formulate the lines on which politics should be conducted, and it was a pleasing thing for party leaders to meet for the purpose of discussing and agreeing upon the availability of candidates. Such meetings were called caucuses, and they soon became the recognized method of putting candidates in the field for the office of President and Vice-President.

The term caucus is of somewhat doubtful origin.²⁰ It is said to be derived from the Algonquin word "kaw-kaw-wus," which means to consult, to speak. But the more probable derivation makes it a corruption of calkers. Webster says that the etymology of the word is uncer-

¹⁹ American Ideals, 150.

²⁰ Encyclopedia of Political Science.

tain, but that its origin is found in the word "cawcaw-assough," or "cau-cau-asu," which was used by the North American Indians, and means one who urges or pushes on, a promoter.

It was a familiar term in Colonial politics long before the beginning of the Revolution. In his diary for February, 1763, John Adams wrote:

"This day learned that the Caucus Club meets, at certain times, in the garret of Tom Dawes, the adjutant of the Boston regiment. He has a large house and a movable partition in his garret which he takes down, and the whole club meets in one room. There they smoke tobacco till you cannot see from one end of the garret to the other. There they drink flip, and there they choose a moderator, who puts questions to the vote regularly; and selectmen, assessors, collectors, wardens, firewards and representatives are regularly chosen before they are chosen in the town. Uncle Fairfield, Story, Ruddock, Adams and Cooper, and a *rudis indigestaque moles* of others, are members. They send committees to wait on the merchants' club, and to propose and join in the choice of men and measures. Captain Cunningham says they have often solicited him to go to the caucuses; they have assured him their benefit in his business, etc."²¹

²¹ Life and Works of John Adams, vol. 2, 144.

A much earlier reference to the term than the above is found in the following note in Gordon's History of the American Revolution:

"The word *caucus*, and its derivative *caucusing*, are often used in Boston. The last answers much to what we stile *parliamentearing* or *electioneering*. All my repeated applications to different gentlemen have not furnished me with a satisfactory account of the origin of *caucus*. It seems to mean, a number of persons, whether more or less, met together to consult upon adopting and prosecuting some scheme of policy, for carrying a favorite point. The word is not of novel invention. More than fifty years ago, Mr. Samuel Adams' father, and twenty others, one or two from the north end of the town, where all the ship business is carried on, used to meet, make a *caucus*, and lay their plan for introducing certain persons into places of trust and power. When they had settled it, they separated, and used each their particular influence within his own circle. He and his friends would furnish themselves with ballots, including the names of the parties fixed upon, which they distributed on the days of election. By acting in concert, together with a careful and extensive distribution of ballots, they generally carried the elections to their own mind. In like manner it was, that Mr. Samuel Adams first became

A calker is one who smears the seams between the planks of a ship with melted pitch. Many persons in the early days were employed in this occupation in Boston, who frequently attended these meetings. From this fact those who were opposed to such gatherings referred to them in a reproachful way as being composed of calkers. What was at first a derisive description came to be a name, and the gatherings of the so-called calkers became recognized as a caucus.²²

The significance of the party caucus in its bearing upon presidential electors was this: Candidates for the Presidency having been nominated as the result of the party caucus, the electors who were elected by the same party felt themselves under obligations to vote for the party candidate for President and Vice-President, and therefore that independence of judgment and action which the Constitution gave to the electors, and which they exercised in the election of Washington and Adams, was surrendered, and the suggestions of the caucus were adopted, often irrespective of the fact that they were contrary to the judgment of the electors.

The caucus system grew in public favor for many years, and was adopted by all political parties of the country. Eventually, however, the opposition to it became very powerful, many of the thoughtful and representative men of the country believing that inasmuch as members of Congress in certain contingencies would have to elect the President and Vice-President they ought not to be so instrumental in selecting candidates for those positions, and this argument was used with much effect. It was taken up by dissatisfied members of the great political parties, and in time what had long been denominated as "King Caucus" lost its influence and prestige in the politics of the country.

National Conventions.—The extinguishment of the caucus as an element in the selection of candidates for the Presidency and Vice-Presidency was succeeded by a more powerful and popular method, which was more potential in overthrowing the agency of the electors than the caucus

a representative for Boston." Gordon's History of the American Revolution, vol. 1, 365.

²² The Caucus. Lalor's Encyclopedia of Political Science.

had been. This new element was the establishment of the national convention, by which is meant an assemblage of men representing a political party who are authorized to adopt a platform and nominate candidates for President and Vice-President. The first convention of this kind which nominated candidates for these positions was held in 1831.²³ It is not the purpose of this work to trace the history of political parties in the United States, except as it is necessary to show the effect of party organization upon the Electoral College. The Convention of 1831 adopted its platform, and nominated its candidates, and from that day until this successive conventions have done the same, until the national convention has become one of the recognized features of American politics, and probably will remain so. It has too deep and strong a hold upon the people to be overthrown easily. Nothing, however, could have been farther from the contemplation of the founders of the Republic, so far as the selection of President and Vice-President is concerned, than the method of nominating candidates for the Presidency and Vice-Presidency by national conventions. These convention delegates, since 1831, have met as the representatives of their parties and nominated candidates for these high positions, and upon their nomination the candidates have been accepted by the parties everywhere as their candidates.

Before the election, tickets are printed in each State with the names of the candidates for President and Vice-President thereon, and upon these tickets are also printed the names of the Presidential electors, so that when the voter deposits his ballot he practically votes for President and Vice-President as well as for the electors. It is true that the members of the Electoral College could elect any persons whom they chose to elect, whether they were the candidates whom the convention had nominated, and whose names are printed on their tickets for President and Vice-President, or not; but it would not be difficult to determine what the fate of the members of the Electoral College would be should they elect persons other than the chosen candidates of the dominant party. Nothing could have been further from the contem-

²³ Woodburn's Political Parties in the United States, 137.

plation of the framers of the Constitution than this. Such a proceeding is exactly what the Constitution intended to avoid; and what the country has experienced since national conventions were first held, now covering a period of nearly three-quarters of a century, is exactly what the Constitution contemplated it never should experience. In other words, there has been the most complete departure from the provisions of that instrument in the manner of choosing the President and Vice-President.

One of the strongest reasons urged in the Convention of 1787 against the election of the President by the people was that they would meet in convention, and, in moments of excitement, nominate some candidate for the Presidency. Mr. Hamilton said:

"It was desirable, that the sense of the people should operate in the choice of the person to whom so important a trust was to be confided. This end will be answered by committing the right of making it, not to any pre-established body, but to men, chosen by the people for the special purpose, and at the particular conjuncture. It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation and to a judicious combination of all the reasons and inducements that were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass will be most likely to possess the information and discernment requisite to so complicated an investigation.

"It was also peculiarly desirable, to afford as little opportunity as possible to tumult and disorder. This evil was not least to be dreaded in the election of a magistrate, who was to have so important an agency in the administration of the Government.—But the precautions which had been so happily concerted in the system under consideration, promise an effectual security against this mischief. The choice of *several*, to form an intermediate body of electors, will be much less apt to convulse the community with any extraordinary or violent movements, than the choice of *one*, who was himself to be the final object of the public wishes. . . .

"Nothing was more to be desired, than that every prac-

ticable obstacle should be opposed to cabal, intrigue, and corruption. These most deadly adversaries of republican government, might naturally have been expected to make their approaches from more than one quarter, but chiefly from the desire in foreign Powers to gain an improper ascendant in our councils. How could they better gratify this, than by raising a creature of their own to the Chief Magistracy of the Union? But the Convention have guarded against all danger of this sort, with the most provident and judicious attention. They have not made the appointment of the President to depend on pre-existing bodies of men, who might be tampered with beforehand to prostitute their votes; but they have referred it in the first instance to an immediate act of the people of America, to be exerted in the choice of persons for the temporary and sole purpose of making the appointment. . . . Thus, without corrupting the body of the people, the immediate agents in the election will at least enter upon the task, free from any sinister bias. Their transient existence, and their detached situation, afford a satisfactory prospect of their continuing so, to the conclusion of it."²⁴

Nothing could have been more remote from Mr. Hamilton's contemplation than the modern method of electing the President and Vice-President. Contrast the methods of the modern national convention with this language, "They have not made the appointment of the President to depend on pre-existing bodies of men, who might be tampered with beforehand, to prostitute their votes." Could there be a greater contrast between this picture of an Electoral College and what everyone knows actually occurs in a national convention? The caucus and the national convention have succeeded the Electoral College in modern days. The electors are no longer the force in the election of the President and Vice-President which the Constitution contemplated they should be. Their function under the Constitution, and as they exercised it in the election of Washington and Adams, was to select the most suitable persons in the whole country for these great positions. Since the inauguration of party machin-

²⁴ The Federalist, No. 68.

ery, which began with the party caucus, and is continued through the machinations of party conventions, they have become shorn of their prerogative, have lost their independence and prestige and, as Mr. Justice Miller has said, are "the puppets selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power."²⁵

Differences of opinion have existed whether the provisions of this amendment were superior to those of the original Constitution covering the same subject. The manner of electing the President in the first instance

²⁵ Miller on the Constitution, 150.

Mr. Jefferson believed the Electoral College should be abolished and the people should elect the President by direct vote. On September 18, 1801, he wrote his Secretary of the Treasury, Albert Gallatin, on the subject:

"The amendment to the Constitution of which you speak would be a remedy to a certain degree, so will a different amendment which I know will be proposed, to wit: to have no electors, but let the people vote directly, and the ticket which has a plurality of the votes of any State, to be considered as receiving thereby the whole vote." Ford's Jefferson, vol. 8, 94.

Many eminent men have agreed with Mr. Jefferson on the subject of abolishing the Electoral College. Senator Sumner introduced a bill for that purpose.

That Mr. Jefferson remained of the same opinion in reference to the Electoral College is shown by the fact that on the 17th of August, 1823, nearly a quarter of a century after he had written Mr. Gallatin, he wrote George Hay:

"I have no hesitation in saying that I have ever considered the constitutional mode of election ultimately by the legislature voting by States as the most dangerous blot in our constn, and one which some unlucky chance will someday hit, and give us a pope & anti-pope. I looked therefore with anxiety to the amendment proposed by Colo. Taylor at the last session of Congress, which I thought would be a good substitute, if on an equal division of the electors after a 2d appeal to them the ultimate decision between the two highest had been given by it to the legislature voting per capita. But the States are now so numerous that I despair of ever seeing another amndmt to the constn, altho the innovns of time will certainly call and now already call for some, and especially the smaller states are so numerous as to render desperate every hope of obtaining a sufficient proportion of them in favor of Phocion's proposition. Another general convention can alone relieve us. What then is the best palliative of the evil in the mean time? Another short question points to the answer. Would we rather the choice should be made by the legislature voting in Congress by states, or in caucus per capita? The remedy is indeed bad, but the disease worse." Ford's Jefferson, vol. 10, 264, 265.

was a source of embarrassment to the Convention and was only adopted after many plans had been suggested and then so suddenly as to exclude that deliberate consideration which the subject demanded.²⁸

Judge Story enumerates what he considers the advantages of each provision and says: "This amendment has alternately been the subject of praise and blame, and experience alone can decide whether the changes proposed by it are, in all respects, for the better or the worse. In some respects it is a substantial improvement. In the first place, under the original mode the Senate was restrained from acting until the House of Representatives had made their selection, which, if parties ran high, might be considerably delayed. By the amendment the Senate may proceed to a choice of the Vice-President immediately, on ascertaining the returns of the votes. In the next place, under the original mode if no choice should be made of a President by the House of Representatives until after the expiration of the term of the preceding officer, there would be no person to perform the functions of the office, and an interregnum would ensue, and a total suspension of the powers of government. By the amendment the new Vice-President would in such a case act as President. By the original mode the Senate are to elect the Vice-President by ballot; by the amendment the mode of choice is left open, so that it may be *viva voce*. Whether this be an improvement or not may be doubted.

"On the other hand, the amendment has certainly greatly diminished the dignity and importance of the office of Vice-President. Though the duties remain the same, he is no longer a competitor for the presidency, and selected, as possessing equal merit, talents, and qualifications, with the other candidate. As every State was originally compelled to vote for two candidates (one of

²⁸ In discussing this question in the House of Representatives Mr. Gregg said: "The article respecting the election of President and Vice-President, I have understood, was suddenly adopted by the Convention. A variety of modes of choosing the Chief Magistrate had been suggested, none of which received the approbation of a majority. Fatigued with the subject, all parties united in support of the mode contained in the article as it now stands, which was not proposed until all the other plans had been rejected." *Annals*, 8th Congress, 1st Session, 701.

whom did not belong to the State) for the same office, a choice was fairly given to all other States to select between them; thus excluding the absolute predominance of any local interest or local partiality.'²⁷

²⁷ Story on Constitution, vol. 2, p. 315.

CHAPTER LIX.

THIRTEENTH AMENDMENT.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

The ratification of this amendment was certified by William H. Seward, as Secretary of State, December 18, 1865.

Sixty-one years intervened after the ratification of the twelfth amendment before another was passed by Congress and ratified by the requisite number of States. The passage of the Thirteenth Amendment was one of the results of the great Civil War, and followed the proclamation of President Lincoln by which he emancipated the slaves.

On the 14th of December, 1863, James M. Ashley, a representative in Congress from Ohio, introduced in the House of Representatives a bill "to provide for the submission to the several States, of a proposition to amend the National Constitution prohibiting slavery, or involuntary servitude, in all of the States and Territories now owned or which may be hereafter acquired by the United States."¹

On the same day Mr. Wilson, a member of the House from Iowa, offered a joint resolution providing that the following sections be submitted to the Legislatures of the several States as an amendment to the Constitution of the United States:

"Section 1. Slavery, being incompatible with a free government, is forever prohibited in the United States; and involuntary servitude shall be permitted only as a punishment for crime.

¹ Cong. Globe, Pt. 1, 1st Sess., 38th Cong. 19.

"Section 2. Congress shall have power to enforce the foregoing section of this article by appropriate legislation."²

The bill of Mr. Ashley and the resolution of Mr. Wilson were referred to the judiciary committee. Before that committee reported on either, the question was taken up in the Senate, and in that body, on January 11, 1864, John B. Henderson, a Senator from Missouri, introduced a joint resolution providing:

"Slavery or involuntary servitude, except as punishment for crime, shall not exist in the United States."³

This resolution was referred to the committee on judiciary, of which Senator Trumbull of Illinois was chairman. On the 8th of February following, Senator Sumner offered a joint resolution that the following article be proposed as an amendment to the Constitution: "Everywhere within the limits of the United States, and of each State or Territory thereof, all persons are equal before the law, so that no person can hold another as a slave."⁴ This resolution was also referred to the committee on judiciary. Two days later that committee reported that the following be submitted as Amendment XIII to the Constitution of the United States:

"Section 1. Neither slavery nor involuntary servitude except as a punishment for crime, whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."⁵

This amendment was based upon a provision in the Ordinance of 1787,^{5a} and was a rejection of all former propositions of amendments. A long debate followed the report of the committee, in which opposition to the proposed amendment was made by Senator Sumner, who spoke

² Cong. Globe, Pt. 1, 1st Sess., 38th Cong. 21.

³ Thorpe's Constitutional History, vol. 3, 129, n.

⁴ Cong. Globe, Pt. 1, 1st Sess., 38 Cong., 521.

⁵ Cong. Globe, Pt. 2, 1st Sess., 38 Cong., 1313.

^{5a} The 6th article of the Ordinance of 1787 contains this provision: "There shall be neither slavery nor involuntary servitude in the States or Territories otherwise than in punishment of crime whereof the parties shall have been duly convicted."

against it. On the 8th of April, 1864, almost two months after the report of the committee, the amendment was passed in the Senate by a vote of 38 yeas to 6 nays.⁶ Having passed the Senate, the amendment went to the House, where, on the 15th of June following, by a vote of 93 yeas to 65 nays, 23 not voting, it failed to secure the requisite two-thirds majority and was consequently lost.⁷

On the 15th of December, 1864, after the reconvening of Congress and after the Presidential election, Mr. Ashley gave notice to the House that on Friday, the 6th of January following, he would call up the motion to reconsider the vote by which the resolution for amending the Constitution was rejected—he having voted against the resolution for the purpose of moving its reconsideration.⁸ On the 6th of January, Mr. Ashley called up the motion “for discussion, intending to allow that discussion to run on until the House saw fit to order the main question to be put.”⁹ Thereupon a debate upon the resolution began, which lasted until the 31st of January, when the House, by a vote of 112 yeas to 57 nays, decided to reconsider its vote on the proposed amendment as it passed the Senate.¹⁰ It then on the same day passed the amendment by a vote of 119 yeas to 56 nays.¹¹

The first of the great amendments to the Constitution growing out of the Civil War had been passed by Congress. It marked the beginning of that eventful period in our national history which saw the adoption of the new amendments, and the great changes which were to occur in our organic law. It was a time of intense excitement in the House of Representatives when the voting on the amendment ended.

In describing it, the *Globe* says: “The announcement that the amendment had passed was received by the House and by the spectators with an outburst of enthusiasm. The members on the Republican side of the House instantly sprung to their feet, and, regardless of parliamentary

⁶ Cong. Globe, Pt. 2, 1st Sess., 38 Cong., 1490.

⁷ Cong. Globe, Pt. 4, 1st Sess., 38 Cong., 2995.

⁸ Cong. Globe, Pt. 1, 2d Sess., 38 Cong., 53.

⁹ Cong. Globe, Pt. 2, 2d Sess., 38 Cong., 138.

¹⁰ Cong. Globe, Pt. 2, 2d Sess., 38 Cong., 530.

¹¹ Cong. Globe, Pt. 2, 2d Sess., 38 Cong., 531.

rules, applauded with cheers and clapping of hands. The example was followed by the male spectators in the galleries, which were crowded to excess, who waved their hats and cheered loud and long, while the ladies, hundreds of whom were present, rose in their seats and waved their handkerchiefs, participating in and adding to the general excitement and intense interest of the scene. This lasted for several minutes."¹²

Then Mr. Ingersoll said: "Mr. Speaker, in honor of this immortal and sublime event I move that the House do now adjourn."

On the 18th of December, 1865, the Secretary of State issued his proclamation announcing the ratification of the amendment by twenty-seven States.¹³

The amendment was adopted for the purpose of abolishing slavery in every form in the United States, and in every place under their control; it did not purport to do more than this, and this was accomplished, not only in the United States proper, but among the Indians of Alaska¹⁴ and among those under the direct supervision of the Government.¹⁵

Effect of the Amendment.—In *United States v. Rhodes* (pp. 37, 38) Mr. Justice Swayne said¹⁶ of this amendment:

"It trenches directly upon the power of the States and of the people of the States. It is the first and only instance of a change of this character in the organic law. It destroyed the most important relation between capital and labor in all the States where slavery existed. It affected deeply the fortunes of a large portion of their people. It struck out of existence millions of property. The measure was the consequence of a strife of opinions, and a conflict of interests, real or imaginary, as old as the Constitution itself. These elements of discord grew in intensity. Their violence was increased by the throes and convulsions of a civil war. The impetuous vortex finally swallowed up the evil, and with it forever the power to restore it. Those who insisted upon the adop-

¹² Cong. Globe, Pt. 1, 2d Sess., 38th Cong., 531.

¹³ 13 Statutes at Large, 774.

¹⁴ *In re Sah Quah*, 31 Fed. Rep., 327, 330.

¹⁵ *United States v. Choctaw Nation et al.*, 38 Ct. Claims, 558, 566.

¹⁶ 1 Abbott's United States Report, 28, 37, 38.

tion of this amendment were animated by no spirit of vengeance. They sought security against the recurrence of a sectional conflict. They felt that much was due to the African race for the part it had borne during the war. They were also impelled by a sense of right and by a strong sense of justice to an unoffending and long-suffering people. These considerations must not be lost sight of when we come to examine the amendment in order to ascertain its proper construction.

"It reversed and annulled the original policy of the Constitution, which left it to each State to decide exclusively for itself whether slavery should or should not exist as a local institution, and what disability should attach to those of a servile race within its limits" (p. 56).

Emmons,¹⁷ Circuit Judge, charged the grand jury that "The Thirteenth Amendment abolished slavery only; it did no more. It gave the freedman no right of protection from the federal government superior to that of his white fellow-citizens, and no exemption from the power of State control which might be exercised against others. The right of legislation secured to Congress in the amendment was that only of creating penalties for a violation of its provisions, and providing securities against the re-establishment of slavery, either generally or in particular instances. It accords no more authority to enact that he should have the right to vote, to testify, to make contracts, to hold real estate, exercise trade, attend public schools, or any other matter or thing within the limits of a State, than it does to enact the same thing in reference to white men. The utmost effect of this great provision in our Constitution was to make the colored man a citizen, equal before the laws with the race which had enslaved him."

In his opinion in the Civil Rights Cases¹⁸ Mr. Justice Bradley said:

"The Thirteenth Amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances. By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to

¹⁷ Fed Cases, No. 18, 260.

¹⁸ 109 U. S., 3, 20.

meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the amendment is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.”

In these cases the court held that the Thirteenth Amendment did not justify the passage of the first and second sections of the act of March 1, 1875, known as the Civil Rights Bill.

Under the Thirteenth Amendment Congress did not assume to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery. The province and scope of the Thirteenth and Fourteenth Amendments are different; the former simply abolished slavery; the latter prohibited the States from abridging the privileges or immunities of citizens of the United States; from depriving them of life, liberty, or property, without due process of law, and from denying to any the equal protection of the laws.

This amendment has respect, not to distinction of race, or class, or color, but to slavery.

Involuntary servitude, its meaning.—In the Slaughter House Cases,¹⁹ Mr. Justice Miller, speaking for a majority of the court, said on this subject:

“That a personal servitude was meant is proved by the use of the word ‘involuntary,’ which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word servitude is of larger meaning than slavery, as the latter is popularly understood in this country, and the obvious purpose was to forbid all shades and conditions of African slavery. It was very well understood that in the form of apprenticeship for long

¹⁹ 16 Wallace, 36, 69, 72.

terms, as it had been practised in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used. . . .

"We do not say that no one else but the negro can share in this protection. Both the language and spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that protection will apply, though the party interested may not be of African descent."

The Thirteenth Amendment was not intended, said Mr. Justice Brown, to introduce any novel doctrine with respect to certain descriptions of service which have always been treated as exceptional; such as military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards. Neither does the amendment make any distinction between a public and private service, and services which have from time immemorial been treated as exceptional are not to be regarded within the purview of the amendment.

So contracts with sailors, for their personal services do not constitute involuntary servitude,²⁰ but peonage, which is "a status or condition of compulsory service, based upon the indebtedness of the peon to the master," is involuntary servitude.²¹

A law which authorizes the hiring out at the door of the Court House, for a period of six months any person defined as a vagrant by the statute was held invalid as imposing imprisonment, involuntary servitude and punishment with-

²⁰ *Robertson v. Baldwin*, 165 U. S., 275, 282.

²¹ *Clyatt v. United States*, 197 U. S., 207, 215.

out any charge, proof, or legislative enactment, making the act a crime.²²

The coercion of alien seamen to labor on board an American vessel against their will, amounts to involuntary servitude within this Amendment.²³

A statute which punishes one who having made a written contract to work for another for a fixed time afterwards and without the consent of the other party to the contract, and without sufficient excuse abandons it and makes a similar contract with another person without telling him of the first contract, is contrary to the Thirteenth Amendment because it establishes a system of peonage and involuntary servitude.²⁴

Attorney General Moody stated the rule to be, "Any person held to labor or service against his will, although he may have voluntarily contracted to submit himself to such control, is in a condition of involuntary servitude, within the meaning of the Constitution."²⁵

Congress shall have power to enforce this article by appropriate legislation.

In *In re Lewis*,²⁶ Shelby, C. J., said: "Congress unquestionably has power to make laws under the 13th Amendment against 'involuntary servitude,' whether it be peonage, vassalage, serfage or villanage."

In *United States v. McClelland et al.*,²⁷ Spear, D. J., in discussing the question as to what constitutes peonage, said: "The substantial inquiry is, did the accused consign or hold the citizen in a condition of involuntary servitude for the purpose of compelling him to work out a real or alleged obligation? This, if done, created a condition of peonage. The involuntary servitude prohibited by the Constitution is a personal servitude, and this consists in the subjection of one person to another. If it consists in the right of property which a person exercises

²² *In re Thompson*, 117 Mo. 83.

²³ *In re Chung Fat*, 96 Fed. Rep., 202.

²⁴ *Peonage Cases*, 123 Fed. Rep., 691.

²⁵ *Op. A. G.*, 477.

²⁶ 114 Fed. Rep., 913, 966.

²⁷ 127 Fed. Rep., 971, 976.

over another, it is slavery. When the subjection of one person to another is not slavery, it consists simply in the right of requiring of another what he is bound to do or not to do. This right arises from all kinds of contracts or quasi contracts. It follows, then, that an unwilling servitude enforced by the stronger to collect a debt is to reduce the victim to the condition of a peon, and largely to the condition of peonage."

In *Clyatt v. United States*,²⁸ in reviewing the peonage statutes, Justice Brewer said: "It is not open to doubt that Congress may enforce the Thirteenth Amendment by direct legislation, punishing the holding of a person in slavery or in involuntary servitude, except as a punishment for crime. In the exercise of that power Congress has enacted these sections denouncing peonage, and punishing one who holds another in that condition of involuntary servitude. This legislation is not limited to the Territories or other parts of the strictly National domain, but is operative in the States and wherever the sovereignty of the United States extends. We entertain no doubt of the validity of this legislation, or of its applicability to the case of any person holding another in a state of peonage, and this whether there be municipal ordinance or state law sanctioning such holding. It operates directly on every citizen of the Republic, wherever his residence may be."

The appropriate legislation which Congress may pass for the purpose of enforcing this amendment may appropriately provide for the punishment of peonage.

Admission to public places not controlled by this Amendment.—It was claimed in the Civil Rights Cases that under this amendment Congress could extend the right of public accommodations in inns, and admission to places of public amusement to colored people, but the court held otherwise. Miller, J., in delivering the opinion,²⁹ said: "There were thousands of free colored people in this country before the abolition of slavery, enjoying all the essentials of life, liberty and property the same as white citizens; yet no one, at that time, thought that it was any invasion of his personal status as a free man

²⁸ 197 U. S., 207, 218.

²⁹ 109 U. S., 3, 25.

because he was not admitted to all the privileges enjoyed by white citizens or because he was subjected to discriminations in the enjoyment of accommodations in inns, public conveyances and places of amusement. Mere discriminations on account of race or color were not regarded as badges of slavery. On the whole we are of opinion, that no countenance of authority for the passage of the law in question can be found in the Thirteenth Amendment of the Constitution."

In his charge to the grand jury, Emmons, C. J.,³⁰ said: "The abolition of slavery placed the negro in the former slave States just where he had before stood in the free States. What Congress could not do in reference to a free negro in a Northern State, where slavery never existed, before the abolition of slavery, it could not afterwards do in regard to one living in the South. We conclude with confidence that the Thirteenth Amendment did not authorize Congress to interfere with the private and internal regulations of theater managers, hotel keepers, or common carriers within the State, in reference to colored persons, any more than it did in regard to their white fellow citizens."

So in *United States v. Harris*,³¹ it was held: "Congress by virtue of the Thirteenth Amendment declared in section 1 of the act of April 9, 1866, that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to none other."

The General Assembly of Louisiana passed a law that, "All railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations. . .

³⁰ Federal Cases No. 18, 260.

³¹ 106 U. S., 629-640.

"No person or persons, shall be admitted to occupy seats in coaches, other than the ones assigned to them on account of the race they belong to."²²

The act further provided that the officers of passenger trains should assign each passenger to the coach or compartment used for the race to which the passenger belonged; and that any passenger who insisted on going into a coach or compartment to which by race he did not belong should be liable to a fine, or imprisonment, and should any passenger refuse to occupy the coach or compartment to which he was assigned by the proper officers of the railway company the officer might refuse to carry him on his train, nor should he be liable for damages for refusal.

Under this act one Plessy, a resident of the State of Louisiana, of mixed descent in the proportion of seven-eighths Caucasian and one-eighth African blood, in whom the mixture of colored blood was not discernible, engaged and paid for a first-class passage on a train running from New Orleans to Covington in the State of Louisiana, and entered the passenger train and took possession of a vacant seat where passengers of the white race were accommodated. He was required by the conductor of the train, under penalty of ejection and imprisonment, to leave the coach, and occupy a seat in a coach assigned to persons not of the white race and for no other reason than that he was of the colored race. Plessy refused to comply with the order and was forcibly ejected from the coach and imprisoned in the parish jail of New Orleans, where he was held to answer a charge that he had criminally violated an act of the Legislature of Louisiana. He was tried before the criminal district court for the parish, where he pleaded that the act of the legislature was in violation of the Constitution of the United States. The plea was overruled. The case was taken to the Supreme Court of the United States. It was claimed in behalf of Plessy that the act was in conflict with the Thirteenth Amendment. The court held that the act in question did not violate the amendment, saying (p. 542):

²² 163 U. S., 537, 540.

"This amendment was said in *Slaughter House Cases* (16 Wallace, 36) to have been intended primarily to abolish slavery as it had been previously known in the United States, and that the amendment equally forbade Mexican peonage or the Chinese coolie trade, when they amounted to slavery, and that the use of the word 'servitude,' was intended to prohibit all forms of involuntary slavery, of whatever class or name.

"A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or reestablish a state of involuntary servitude."

Where an indictment charged that certain persons had conspired together in a State for the purpose of preventing certain citizens of that State of African descent from making or executing certain contracts and agreements to perform labor, because of their race and color, it was held that a United States court had no jurisdiction over the case under the Thirteenth Amendment.²⁸

In delivering the opinion, Mr. Justice Brewer said (p. 18): "It does not appear from the record that the parties charged to have been wronged by the defendants had ever been slaves, or were the descendants of slaves. They took no more from the amendment than any other citizens of the United States. But if, as we have seen, that denounces a condition possible for all races and all individuals, then a like wrong perpetrated by white men upon a Chinese, or by black men upon a white man, or by any men upon any man on account of his race, would come within the jurisdiction of Congress, and that protection of individual rights which prior to the Thirteenth Amendment was unquestionably within the jurisdiction solely of the States, would, by virtue of that amendment, be transferred to the Nation and subject to the legislation of Congress."

²⁸ *Hodges v. United States*, 203 U. S., 1, 18.

CHAPTER LX.

FOURTEENTH AMENDMENT.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But

Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The ratification of this amendment was certified by Mr. Seward as Secretary of State, July 20, 1868.

History of the Amendment.—This in many respects is the greatest of all the amendments to the Constitution. It is a limitation upon the power of the States, and in that respect is the counterpart of the original amendments, they being limitations on the power of the general government. Like the Thirteenth and Fifteenth Amendments it was passed by Congress and ratified by the legislatures of a sufficient number of States in the interest of the colored race in the United States, though its language is not restricted to that race, but applies to citizens of the whole country.

Shortly after the close of the Civil War it became evident to the party dominant in Congress and in the country that it would be necessary for the federal government to legislate in the interest of the colored race if that race was to be protected in its personal and political rights. The legislatures of several States passed laws imposing great hardships upon those who had recently been slaves, and deprived them of rights which it was supposed had been secured to them by acts of Congress. Commenting upon this situation, Mr. Justice Miller, in his opinion in the Slaughter House Cases, said:

“The former slaves were in some States forbidden to appear in the towns in any other character than menial servants. They were required to reside on and cultivate

the soil without the right to purchase or own it. They were excluded from many occupations of gain, and were not permitted to give testimony in the courts in any case where a white man was a party. It was said that their lives were at the mercy of bad men, either because the laws for their protection were insufficient or were not enforced.

"In addition to this ill treatment several of the States passed statutes which imposed heavy fines upon persons who might be found without work and such persons were classed as loiterers. Those who had recently been in slavery could get no work and had no money, but if they were found idling they were tried, and, if convicted, and unable to pay their fines, they were hired out to the person bidding the most for them.

"By another law adult freedmen were required to provide themselves with homes and visible means of support within twenty days after the passage of the act, and the penalty, if they failed to do so, was that they should be hired out at public outcry to the highest bidder for one year. Still another law provided that all farm laborers should be compelled to contract for their labor within the first ten days of each year and the contract should exist all the year, and failure to comply with this law was punished by fines and penalties." Those who had formerly been slaves were denied the opportunity of securing an education and then denied the privilege of citizenship because they were ignorant.

"These circumstances," said Mr. Justice Miller, "whatever of falsehood or misconception may have been mingled with their presentation, forced upon the statesmen who had conducted the Federal government in safety through the crisis of the Rebellion, and who supposed that by the Thirteenth Article of Amendment they had secured the result of their labors, the conviction that something more was necessary in the way of constitutional protection to the unfortunate race who had suffered so much."¹

Under such condition of affairs, for the purpose of formulating a measure for securing equal rights to

¹ Slaughter House Cases, 16 Wallace, 70.

every citizen of the country regardless of his former condition, the leaders of the dominant party in Congress took up the great problems which led them to adopt this amendment. It will be conceded that no more important questions were ever presented to a legislative body than were raised at that time before the law-making body of the American Union. After much consideration by the leaders of the majority party in Congress, in which the whole subject was carefully discussed, the House of Representatives, on December 5, 1865, passed a resolution to the effect that a joint committee of fifteen members should be appointed, nine of whom should be members of that body and six should be members of the Senate, who "should inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, were entitled to be represented in either House of Congress, and until such report should be made and finally acted on by Congress no member should be received into either House from any of the so-called Confederate States."

On December 12th following, the Senate began the consideration of the resolution which had passed the House, and amended it to read: "That a joint committee of fifteen members shall be appointed, nine of whom shall be members of the House and six members of the Senate, who shall inquire into the condition of the States which formed the so-called Confederate States of America, and report whether they, or any of them, are entitled to be represented in either House of Congress; with leave to report at any time, by bill or otherwise." On the following day the House of Representatives agreed to the amendment which the Senate made to its former resolution.

The committee on the part of the Senate consisted of William P. Fessenden, of Maine; James W. Grimes, of Iowa; Ira Harris, of New York; Jacob M. Howard, of Michigan; Reverdy Johnson, of Maryland, and George H. Williams, of Oregon. On behalf of the House it consisted of Thaddeus Stevens, of Pennsylvania; Elihu B. Washburn, of Illinois; Justin S. Morrill, of Vermont; Henry Grider, of Kentucky; John A. Bingham, of Ohio;

Roscoe Conkling, of New York; George S. Boutwell, of Massachusetts; Henry T. Blow, of Missouri, and Andrew J. Rogers, of New Jersey.

After examining various matters and many bills and proposed amendments relating to the subject which had been submitted to the House of Representatives, a majority of the committee, on the 30th of April, 1866, submitted the result of their investigations to the House in the form of a joint resolution and a proposed amendment to the Constitution, which were presented to the House by Mr. Stevens on the same day.²

² The following are the resolution and article:

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of both Houses concurring), That the following article be proposed to the Legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said Legislatures, shall be valid as part of the Constitution, namely: —

"ARTICLE ———.

"Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States which may be included within this Union according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age.

"Section 3. Until the fourth day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States.

"Section 4. Neither the United States nor any State shall assume or pay any debt or obligation already incurred, or which may hereafter be incurred, in aid of insurrection or of war against the United States, or any claim for compensation for loss of involuntary service or labor.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."—Cong. Globe, Pt. 3, 1st Sess., 39th Cong., 2286.

The introduction of the resolution and article at once provoked an animated debate in which the whole question of the duty of the Government to those lately held as slaves and the relation of the Confederate States to the Government were thoroughly discussed. In the debate Mr. Garfield offered an amendment that: "All persons who voluntarily adhered to the late insurrection, giving aid and comfort to the so-called Southern Confederacy, are forever excluded from holding any office of trust or profit under the Government of the United States." This was defeated.³

On the 10th of May the final vote on the resolution and article was taken in the House, and they were passed without change as they had been reported to that body, by 128 yeas to 37 nays, 19 not voting.⁴

The article then went to the Senate, but there it met with successful resistance. The first attack upon it was made by Reverdy Johnson, Senator from Maryland, who moved to strike out the third section, which read: "Until the fourth day of July, in the year 1870, all persons who voluntarily adhered to the late insurrection, giving it aid and comfort, shall be excluded from the right to vote for Representatives in Congress and for electors for President and Vice-President of the United States." The motion was carried by a unanimous vote.⁵

Senator Howard, of Michigan, who had been a member of the joint committee on reconstruction, then offered the following amendment as a prefix to the first section of the article, which was intended as a legislative definition of citizenship of the United States: "All persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside." In support of his amendment the Senator said: "This is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States, and subject to their jurisdiction, is by virtue of natural law and national law a citizen of the United States. This will not, of course, include persons born in

³ Cong. Globe, Pt. 3, 1st Sess., 39th Cong., 2545.

⁴ Cong. Globe, Pt. 3, 1st Sess., 39th Cong., 2545.

⁵ Cong. Globe, Pt. 3, 1st Sess., 39th Cong., 2869.

the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of the country."⁶

Senator Reverdy Johnson, speaking on the first section of the article and proposed amendment, said: "I am decidedly in favor of the first part of the section which defines what citizenship shall be, and in favor of that part of the section which denies to a State the right to deprive any person of life, liberty or property without due process of law, but I think it is quite objectionable to provide that, 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States,' simply because I do not understand what will be the effect of that. * * * I move, therefore, to amend the section as it now stands by striking out the words, 'Make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State;' so as to make the section read: 'No State shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'" But this amendment was rejected, and that of Senator Howard was passed.⁷

The very important words "or naturalized,"⁸ which ap-

⁶ Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 2890.

⁷ Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 3041.

⁸ The subject of naturalization is exclusively regulated by Congress. An alien to be entitled to admission as a citizen, must have resided within the United States for a continuous term of five years, and complied with the naturalization laws. The act forbids the naturalization of anarchists or polygamists. An anarchist is defined to be one who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government because of his or their official character.

pear in the first section of the amendment, were offered in the debate by Senator Fessenden, of Maine, and were accepted without objection.*

The second section of the article as it passed the House read as follows: "Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever in any State the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged, except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens not less than twenty-one years of age."

Senator Williams, of Oregon, proposed to amend this section so it would read: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever the right to vote at any election held under the Constitution and laws of the United States, or of any State, is denied to any of the male inhabitants of such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State."

In support of his amendment Senator Williams said: "It was suggested, with considerable force, that this section related to the apportionment of representation, and that the words 'elective franchise' might be construed as exclusively applying to that subject, and that a State might claim that it was entitled to count persons as allowed to vote when it extended the elective franchise to such persons so far as the election of Representatives was concerned; and therefore the words, 'any election

* Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 3040.

held under the Constitution and laws of the United States or of any State,' were substituted so that electors could not be deprived of the right to vote at State elections. The object of the change in the phraseology is to require the State to allow those persons, before they can be counted in the basis of representation, to vote at elections held under the constitution and laws of the State as well as at elections held under the Constitution and laws of the United States; so that there is substantially no difference."⁹

After a lengthy debate upon his proposed amendment the Senator modified it by omitting the words, "But whenever the right to vote at any election held under the Constitution and laws of the United States, or of any State," and inserting in their place the words, "But whenever the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or members of the Legislature thereof." The amendment was then accepted.¹⁰

Opposition arose against this section as amended, and it was not confined to the opposition party. Senator Howard opposed it, and offered the following in its place: "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever the right to vote at any election held under the constitution and laws of any State for members of the most numerous branch of its Legislature is denied to any male inhabitants of such State, being twenty-one years of age and a citizen of the United States, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State." This was lost.

Senator Howard also moved to strike out the words, "or in any way abridged," which appear in the amendment offered by Senator Williams, but this motion

⁹ Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 2991.

¹⁰ Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 3029.

was rejected,¹¹ and the amendment of Senator Williams was agreed to by a vote of 31 yeas to 11 nays.¹²

The wording of the amendment as adopted differed greatly from the corresponding language in the article as it came from the House, and from the first amendment offered by Senator Williams. In its enumeration of officers for whom male citizens might vote it included two classes, first, electors for President and Vice-President and Representatives in Congress; second, executive and judicial officers of a State or members of a State Legislature. Did the amendment propose to confer upon Congress the power to regulate a State election for State officers, or did it assume that this power already existed in Congress? Or, was it not an admission by Congress that the power to regulate a State election for State officers was lodged in the State, with a reservation that if the right of any one to vote at an election for any of the officers mentioned in the amendment should be denied by any State, the Federal Government should be empowered to reduce the basis of representation in such State in proportion as its citizens entitled to vote were deprived of that right? This was the view the dominant party in Congress took of the matter. Beyond question the purpose was to make secure the right of the colored man to vote. It was supposed that rather than have the number of its representatives in Congress reduced, each State would see that every voter cast his ballot without interruption or fear of injury for doing so. The amendment, therefore, as a philosophical writer has said, was "in the nature of an inducement, not of a threat."¹³ In any event it is difficult to see how it could be construed as an assumption by Congress of the power to control an election in a State for State officers.

Senator Howard then offered the following amendment as a substitute for section 3, which had been stricken out on motion of Senator Reverdy Johnson: "No person shall be a Senator or Representative in Congress, or an elector of President and Vice-President, or hold any office, civil or military, under the United States, or under

¹¹ Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 3039.

¹² Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 3041.

¹³ Thorpe's Constitutional History, vol. 3, 273.

any State, who, having previously taken an oath as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof; but Congress may, by a vote of two-thirds of each House, remove such disability."¹⁴

While this amendment was under consideration, Senator Davis moved to amend it so as to limit the effect of the violation of the Constitution to Federal officers, and to exclude State officers from the ineligibility proposed in the amendment,¹⁵ but this proposed amendment was defeated and the original amendment adopted.

Senator Clark offered, as a substitute for sections 4 and 5 of the article as it passed the House, the following amendment, which was agreed to:

"The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."¹⁶

The amendments were then voted on as a whole and passed by a vote of 33 yeas as against 11 nays, 5 being absent.¹⁷ The whole amendment then went back to the House, where, on the 13th day of June, 1866, it was passed by that body without change, by the vote of 120 yeas to 32 nays, 32 not voting.¹⁸ The only section in the amendment which was not changed in the Senate, but passed that body in the language and form in which it first passed the House, was what is now the fifth and last section of the amendment.

¹⁴ Cong. Globe, Pt. 3, 1st Sess., 39th Cong., 2869.

¹⁵ Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 3041.

¹⁶ Cong. Globe, Pt. 4, 1st Sess., 39th Cong. 3040.

¹⁷ Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 3042.

¹⁸ Cong. Globe, Pt. 4, 1st Sess., 39th Cong. 3148, 3149.

Many statesmen, judges, authors, lawyers and publicists have compared this amendment to Magna Charta, and have maintained that it was the great Magna Charta of American constitutional liberty,¹⁹ and one constitutional writer says it could appropriately be called Maxima Charta.²⁰ No other single constitutional enactment ever so vitally affected so many human beings in so short a time. It changed almost instantly the civil, political and social condition of more than four millions of people; by giving them the constitutional right to bring suit, testify in court, make contracts, purchase, lease, sell, hold, possess, and convey real and personal property, and enjoy the same personal and political liberty which had been enjoyed from the beginning of the Government by white citizens; and it forbade any State to deprive any person of life, liberty or property without due process of law; or to deny to any of them within its jurisdiction the equal protection of the laws. The history of government through all its forms of growth and development from the first establishment of civil authority among mankind to the present time furnishes no parallel to this.

Volumes have been written on the amendment and more than fifteen hundred decisions by Federal and State courts have been rendered and reported on various questions growing out of it, ranging from the power of a municipal council to regulate the height of a board fence,²¹ the beating of drums on the street,²² the right of a legislature to pass a law punishing railroad companies for permitting thistles to grow to seed upon their rights of way,²³ punishing the sale of adulterated milk,²⁴ the validity of a statute providing punishment for selling or using for illuminating purposes a product of petroleum emitting a combustible vapor at less than a given degree Fahrenheit,²⁵ the amount the owner of a dog may recover

¹⁹ In his dissenting opinion in the Slaughter House Cases, Mr. Justice Swayne said: "Fairly construed, the new amendments may be said to rise to the dignity of a new Magna Charta." 16 Wall., 125.

²⁰ Brannon's Fourteenth Amendment, 10.

²¹ In re Wilshire, 103 Fed. Rep., 620, 622.

²² In re Flaherty, 27 L. R. A., 529.

²³ Missouri, etc., R. R. Co. v. May, 194 U. S., 267, 269.

²⁴ State v. Smith, 14 R. I., 100.

²⁵ State v. Santee, 111 Iowa, 2.

for his unlawful killing,²⁶ the validity of an ordinance for the cremation of garbage and refuse,²⁷ to the gravest questions of constitutional law. It is, therefore, quite beyond the scope of this work to consider the amendment in its various relations to the general government, the State, the municipality, or the citizen. It can only be hoped to present its most important provisions and cite some of the leading cases in which they have been construed; referring those who desire special information concerning it to the many decisions in which its provisions have been considered or to the learned works which have been written on it.²⁸

Legislation pertinent to this Amendment.—In the great case of *Dred Scott v. Sanford*, decided by the Supreme Court in 1856,²⁹ Chief Justice Taney said:

“The words, ‘people of the United States’ and ‘citizens,’ are synonymous terms, and mean the same thing. They both describe the political body who, according to our own republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the ‘sovereign people,’ and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons³⁰ described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty. We think they are not, and that they are not included, and were not intended to be included, under the word ‘citizens’ in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant

²⁶ *Sentell v. N. O. & R. Co.*, 166 U. S., 698, 705.

²⁷ *Reduction Co. v. Sanitary Reduction Works*, 199 U. S., 318.

²⁸ See “Fourteenth Amendment” by Mr. William D. Guthrie, of the New York Bar, and Judge Henry Brannon, of the Supreme Court of West Virginia; also “The Fourteenth Amendment” in Thorpe’s *Constitutional History of the United States*, vol. 3.

²⁹ 19 Howard, 393, 404.

³⁰ “The class of persons” referred to by the Chief Justice were the *slaves*.

race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them."

As one of the results of the great civil war, "those who held the power and the Government chose to grant" the colored race all the rights and privileges then possessed by other citizens of the United States. Consequently in April, 1866,²¹ Congress passed what is known as the "Civil Rights Bill," which provided that all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, were citizens of the United States; and that citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof they had been duly convicted, should have the same right in every State and Territory in the United States, first, to make and enforce contracts; second, to sue; third, be parties; fourth, give evidence; fifth, to inherit; sixth, to purchase, lease, sell, hold and convey real and personal property; seventh, to have the full and equal benefit of all laws and proceedings for the security of person and property enjoyed by white citizens; and eighth, should be subject to like punishment, pains and penalties, and to none other, any law, statute, ordinance, regulation or custom to the contrary notwithstanding. On April 6, 1866, President Johnson returned the bill to Congress with his objections, whereupon the Senate, on the same day, passed it by the lawful majority over his veto, and on April 9th the House of Representatives did the same.

The law imposed the same duties and obligations upon those who had lately been slaves which already rested upon other citizens of the United States. It was considered necessary to do this because of the attitude of some of the States towards those upon whom suffrage had been conferred by the amendment, and the way they had been treated by some of the citizens in those States. After the passage of the bill the Fourteenth Amendment was adopted and ratified, and to secure beyond any question the rights conferred by the bill, the

²¹ 14 Statutes at Large, 27.

principle which it involved was inserted in the amendment.

In April, 1871, Congress passed another bill in which it was provided that, "All citizens of the United States who are or shall be otherwise qualified by law to vote at any election, shall be entitled and allowed to vote at all such elections, without distinction of race, color or previous condition of servitude; any constitution, law, custom, usage or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding."³² The 18th section of this act specially re-enacted the Civil Rights Bill of April 9, 1866. Senator Doolittle, in a speech in the Senate, suggested that the motive which influenced Congress to re-enact the bill was to strengthen its constitutionality, inasmuch as the Fourteenth Amendment had been adopted since its passage. He said that a statement to that effect had been made by Mr. Bingham in his speech in the House of Representatives on the report of the committee on reconstruction. But Senators Fessenden and Howard, who were members of that committee, promptly denied this, and also denied that the committee on reconstruction ever considered that the Civil Rights Bill was of doubtful constitutionality.³³ Mr. Justice Field, in his dissenting opinion in the Slaughter House Cases, repeated the suggestion of Senator Doolittle concerning the motive of Congress in re-enacting the bill.³⁴

Judicial construction of the Amendment.—On March 8, 1869, the legislature of Louisiana passed an act giving a corporation, created under the laws of that State, the exclusive right for the period of twenty-five years to erect and maintain slaughter houses, landings for cattle, and yards for confining cattle to be slaughtered within the parishes of Orleans, Jefferson and St. Bernard, which contained a territory of nearly twelve hundred square miles, including the city of New Orleans. The act prohibited any persons other than the corporation named from building, maintaining, or having slaughter houses, or landings for cattle, or yards for confining cattle which

³² 16 Statutes at Large, 140.

³³ Cong. Globe, Pt. 4, 39th Cong., 2996.

³⁴ 16 Wallace, 97.

were to be slaughtered within the limits prescribed by said act. It also required all cattle and other animals which were to be slaughtered for food within this territory to be brought to the slaughter houses and works of the corporation, and that a fee should be paid to the company for the right to slaughter cattle in its slaughter houses. Suits were brought to contest the validity of this legislation which was sustained by the Supreme Court of Louisiana. The cases were then taken to the Supreme Court of the United States, and are known as the Slaughter House Cases.³⁵ As this was the first time the amendment came before the Supreme Court of the United States, and as four of the justices dissented from the opinion which was rendered, and three of them wrote separate dissenting opinions, and the fact that the opinion of the majority was severely criticised at the time by many statesmen of that day, and has been much criticised by judges and authors, if not overruled in some respects, it is proposed to examine this decision somewhat at length before passing to a general view of the amendment and the decisions relating to it.

Mr. Justice Miller delivered the opinion of the majority of the court. It was claimed he said, that the act of the legislature of Louisiana was in contravention of the Fourteenth Amendment in the following particulars:

First, that it creates an involuntary servitude forbidden by the Thirteenth Amendment.

Second, that it abridges the privileges and immunities of citizens of the United States.

Third, that it denies to the plaintiffs the equal protection of the laws.

Fourth, that it deprives them of their property without due process of law; contrary to the provisions of the first section of the Fourteenth Amendment.³⁶

Undoubtedly, said the Justice (p. 72), the Thirteenth Amendment was intended by Congress to abolish slavery as it existed in the United States at the time of its passage, although it forbids any other kind of slavery at any time. If Mexican peonage or the Chinese coolie labor system shall develop slavery of either of these races, in the United

³⁵ 16 Wall., 36.

³⁶ 16 Wall., 66.

States, the provisions of the amendment would apply in either case to make it void.

Citizenship defined.—Concerning the Fourteenth Amendment the learned Justice said (pp. 72, 73): "The first section of the Article defined citizenship of the United States, and citizenship of the States, that no such definition had been found in the Constitution before nor had Congress attempted to define it."^{26a}

"It had been the occasion of much discussion in the Courts, by the executive departments, and in the public journals. It had been said by eminent judges that no man was a citizen of the United States except as he was a citizen of one of the States composing the Union. Those, therefore, who had been born and resided always in the District of Columbia or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided. But it had been held by this court, in the celebrated *Dred Scott* case, only a few years before the outbreak of the civil war, that a man of African descent, whether a slave or not, was not and could not be a citizen of a State or of the United States. This decision, while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who

^{26a} Commenting upon the effect of the Fourteenth Amendment upon the subject of citizenship Mr. Hannis Taylor says:

"From a purely scientific point of view the Constitution of the United States never reached its logical completion until after the adoption of the Fourteenth Amendment. As heretofore pointed out, the new principle which became the basis of the more perfect union, and which imparted to it its distinctive character, was that the sum of federal power vested in the new Constitution should operate not upon States in their corporate capacity, but directly upon individuals. If that principle had been carried, at the time of its adoption, to its logical conclusion, it would then have been settled that the individuals upon whom the new government was to act should be primarily its own citizens. . . . And yet at the time of the adoption of the present Constitution the sense of nationality had not sufficiently developed to permit the statement of the ultimate and inevitable conclusion, that every citizen of the Union is primarily a citizen of the United States, and not merely of one of the States, which compose them." Taylor's *Origin and Growth of the English Constitution*, Vol. 1, 74, 75.

had recently been made freemen, were still, not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution.

"To remove this difficulty primarily, and to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State, the first clause of the first section was framed. . . . This clause declares that persons may be citizens of the United States without regard to their citizenship of a particular State, and it overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States. That its main purpose was to establish the citizenship of the negro can admit of no doubt. . . .

"The next observation is that the distinction between citizenship of the United States and citizenship of a State is clearly recognized and established. Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union.

"It is quite clear, then, that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the individual."

Privileges and immunities.—The second clause of the first section of the amendment, continues the opinion just cited, refers to the privileges and immunities of citizens of the United States and not to those of citizens of the State, and said that citizens of the States are "left to the State governments for security and protection, in their privileges and immunities and not placed by the amendment under the special care of the Federal government."

The privileges and immunities of citizens of the States, "embrace nearly every civil right for the establishment and protection of which organized government is instituted. They are those rights which are fundamental (p. 76).

"The privileges and immunities of citizens of the United

States are those which owe their existence to the Federal government, its national character, its Constitution, or its laws, and it is those privileges and immunities which are placed by this amendment under the protection of Congress (p. 79).

"Among the privileges and immunities of the citizens of the United States is the right which such citizen has to come to the seat of government to assert any claim he may have against the government, to transact any business he may have with the government, to seek its protection, to share its offices, to engage in administering its functions. Such citizen also has the right of free access to its seaports, to the sub-treasuries, land offices, and courts of justice in the several States; he can also demand the care and protection of the Federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government. He also has the right to peaceably assemble and petition for redress of grievances, and the privilege of the writ of *habeas corpus*; the right to use the navigable waters of the United States; to have all rights secured to our citizens by treaties with foreign nations, and can by his own volition become a citizen of any State of the Union by a *bona fide* residence therein, with the same rights as other citizens of that State."

These are some of the privileges and immunities which the opinion declares citizens of the United States are entitled to (p. 79).

"The clause of the amendment forbidding the States to deny to any one the equal protection of the laws was intended to prevent discrimination against the negroes, and full power is conferred upon Congress by this clause to secure to the negro equality before the law." (p. 81).

From this opinion Chief Justice Chase and Justices Field, Bradley and Swayne dissented. This opinion has many times been criticised by eminent jurists and statesmen, and Mr. Justice Moody, in the recent case of *Twining v. New Jersey*,⁸⁷ said: "It has never received universal assent by members of this court."

⁸⁷ 211 U. S., 96.

The dissenting opinions have always been regarded by many able constitutional lawyers and jurists as the correct construction of the amendment. The decision was a disappointment to many of the states-

Purpose of the First Section of the Amendment.—We have seen that Senator Howard when he proposed his amendment to the first section of the article as it came from the House stated that this purpose was to settle the question of citizenship in the United States. This his amendment did. "The main object of the opening sentence of the amendment," said Mr. Justice Gray, in *Elkins v. Wilkins*,³⁸ "was to settle the question, upon which there had been a difference of opinion throughout the country and in this court, as to the citizenship of free negroes; and to put it beyond doubt that all persons, white or black, and whether formerly slaves or not, born or naturalized in the United States, and owing no allegiance to any alien power, should be citizens of the United States and of the State wherein they reside."

Scope of the First Section of the Amendment.—Matthews, Justice, in *Yick Wo v. Hopkins*,³⁹ referring to the last clause of this section of the amendment, said: "These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality." And in *In re Rodriguez*, it was held by the district court that: "While the 14th amendment was intended primarily for the benefit of the negro race, it also confers the right of citizenship upon persons of all other races,

men and party leaders who were instrumental in passing it through Congress.

Criticisms of it will be found in Guthrie on the Fourteenth Amendment, in Burgess's Political Science and Constitutional Law, vol. 1, 225, 228, and in Blaine's Twenty Years in Congress, vol. 2, 419, 420.

Mr. Justice Field in his dissenting opinion said (p. 96): "If the amendment was intended to apply only to citizens of the United States (as the opinion held), it was a vain and idle enactment which accomplished nothing, and most unnecessarily excited Congress and the people on its passage. With privileges and immunities thus designated or implied, no State could ever have interfered by its laws, and no new constitutional provision was required to inhibit such interference. The supremacy of the Constitution and the laws of the United States always controlled any State legislation of that character. But if the amendment refers to the natural and inalienable rights which belong to all citizens, the inhibition has a profound significance and consequence."

³⁸ 112 U. S., 94, 101.

³⁹ 118 U. S., 356, 369.

white, yellow, or red, born or naturalized in the United States and subject to the jurisdiction thereof."⁴⁰

Citizens of the United States and of the State wherein they reside.—The question of citizenship is complex. This is largely due to our twofold system of government. Since the adoption of the Fourteenth Amendment, there is a citizenship of a State and of the United States. One may be a citizen of the United States, without being a citizen of a State, and he can be an elector of a State, by virtue of its constitutional provisions, without being a citizen of the United States.

The framers of the Constitution used the word citizen in its common-law sense, and seem to have assumed that its meaning was well understood. It was not until 1866 that Congress defined who was a citizen of the United States, in this language: "All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States."

This was followed by the definition of citizenship in the Fourteenth Amendment. This definition changed the rule of citizenship in the United States, reversing, as it were, all previous decisions of the courts on the subject, and made every person born or naturalized in the United States and subject to the jurisdiction thereof, a citizen of the United States and of the State of his residence. To make a person a citizen of a State he must reside within it, but he need only be born or naturalized in the United States to become a citizen thereof.⁴¹

The complexity of the subject arises from the fact that the Constitution recognizes two territorial jurisdictions, the State and the United States. Before the adoption of this amendment, the Constitution did not define who were citizens of the United States, but a citizen of the United States residing in any State of the Union was a citizen of that State.⁴²

⁴⁰ 81 Fed. Rep., 337, 353.

⁴¹ Slaughter House Cases, 16 Wall., 74.

⁴² Gassin v. Ballard, 6 Peters, 762.

Mr. Calhoun in a speech in the United States Senate in 1833 on the subject of citizenship said: "I do not object to the expression that we are citizens of the United States, nor shall I detract from the proud and elevated feelings with which it is associated: but I

Out of this duplex citizenship grows a question which might be made to reach a national magnitude. A foreigner cannot become a citizen of the United States until he has resided here five years and complied with the provisions of our naturalization laws, but by becoming a citizen of the United States he does not for that reason become a citizen of any particular State. The Fourteenth Amendment does not deal with the question of State citizenship, except to say that persons who are citizens of the United States are citizens of the State in which they reside. It does not cross the line of the States and undertake to define residence in a State. The Constitution of the United States cannot go into the States and prescribe a rule for State suffrage. The States establish their own rules of suffrage and in many of them foreigners are permitted to vote for State and federal officers, who have been in a State a much shorter time than is required to make them citizens of the United States. This is due to the State Con-

trust that I may be permitted to raise the inquiry. In what manner are we citizens of the United States? without weakening the patriotic feeling with which, I trust, it will ever be uttered. If by citizen of the United States he means a citizen at large, one whose citizenship extends to the entire geographical limits of the country, without having a local citizenship in some State or territory, a sort of citizen of the world, all I have to say is, that such a citizen would be a perfect nondescript; that not a single individual of this description can be found in the entire mass of our population.

"Notwithstanding all the pomp and display of eloquence on the occasion, every citizen is a citizen of some State or territory, and, as such, under an express provision of the Constitution, is entitled to all privileges and immunities of citizens in the several States; and it is in this, and in no other sense, that we are citizens of the United States. The Senator from Pennsylvania (Mr. Dallas), indeed, relies upon that provision in the Constitution which gives Congress the power to establish a uniform rule of naturalization; and the operation of the rule actually established under this authority, to prove that naturalized citizens are citizens at large, without being citizens of any of the States. I do not deem it necessary to examine the law of Congress upon this subject, or to reply to the argument of the Senator, though I cannot doubt that he (Mr. D.) has taken an entirely erroneous view of the subject. It is sufficient that the power of Congress extends simply to the establishment of a uniform rule by which foreigners may be naturalized in the several States or territories, without infringing, in any other respect, in reference to naturalization, the rights of the States as they existed before the adoption of the Constitution." Calhoun's Works, vol. 2, 242, 243.

stitutions regulating suffrage therein. In other words the plain requirements of the acts of Congress on the subject of naturalization are overthrown by the constitutional and statutory provisions of the States, and it is because of this that the question arises.

The Constitution of Indiana provides: "Every male citizen of foreign birth, of the age of twenty-one years and upwards, who shall have resided in the United States one year and shall have resided in this State during the six months, and in the township sixty days and in the ward precinct thirty days, immediately preceding said election, and shall have declared his intention to become a citizen of the United States, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote in the Township or precinct where he may reside, if he shall have been duly registered according to law." This provision is similar to that in many State Constitutions.

A writer on this subject says: "In many of the States the qualifications for electors of the most numerous branch of the State legislature are bestowed upon aliens who have made their preliminary declarations; consequently, it happens that in many instances the persons who vote for members of the Congress of the United States are not even citizens of the United States. Under this condition, it is conceivable that in the different States the votes of aliens in the United States might elect sufficient members of the House of Representatives of the United States to control the action of the Congress of the United States."⁴³

This is a matter which should have the attention of Congress, especially since it is held by the Supreme Court that the election of Representatives in Congress is not wholly controlled by the States, but is subject to the provisions of the Constitution and the enactments of Congress. What does it avail that body to pass laws on the subject of naturalization, and fix the period which foreigners must reside in the United States before they

⁴³ Wise on Citizenship, p. 67. Mr. Bryce says, "In more than a third of the States the electoral franchise is now enjoyed by persons not naturalized as United States citizens." Bryce's *American Commonwealth*, Vol. 1, 406.

can become citizens when the States may fix a much shorter period in which foreigners can vote, and in this way annul the legislation of Congress? Whether a State can confer such a right upon one not a citizen of the United States is questionable.⁴⁴ However liberal a State may be in conferring upon foreigners the right to vote for State officers, it ought not to permit them to vote for electors of President and Vice-President and members of Congress, when they have not been in the United States the necessary time to acquire national citizenship. Such conduct on the part of the States is a clear departure from the purpose and intention of the framers of the Constitution. The power of Congress over the subject matter of naturalization is complete and it was intended by the Convention that it should be so.

Mr. Curtis says: "The power that was given by unanimous consent, over the subject of naturalization, shows the strong purpose that was entertained of vesting in the national authority an efficient practical control over the States in respect to the political rights to be conceded to persons not natives of the country."⁴⁵ But the States from time to time have adopted constitutions and passed laws wholly at variance with the naturalization laws.

In discussing the attitude of the States one authority says: "The better opinion would, however, seem to be that the power of Congress to establish a 'uniform rule of naturalization' covers the entire ground and precludes the State from conferring suffrage on persons who are not citizens of the United States, with the effect of enabling them to control those who are. The opposite view leads to an incongruous result. The United States may naturalize, but can not confer the suffrage; the States can not naturalize, but may confer the suffrage on persons whom the United States decline to admit or recognize as citizens. The States, consequently, have the upper hand, because the right to vote involves the power to govern; and an alien who has it stands at a higher level than a citizen from whom it is withheld. Reading the Constitution in the light of the Fifteenth Amendment, the just inference would seem to be that national citizenship is a prerequisite to the right

⁴⁴ Cooley's Principles of Constitutional Law, 89.

⁴⁵ Curtis, History of the Constitution, Vol. 2, 202.

of suffrage, and that every person who has it is a citizen of the State in which he makes his abode.”⁴⁶

The laws of the territories and of Alaska require an elector to be a citizen of the United States. This shows that in providing for the exercise of suffrage the territorial laws do not prescribe a shorter period of residence as a qualification for voting than is fixed by the federal government for naturalization. In other words in the territories, a foreigner can not vote until he has resided in the United States five years, and becomes naturalized, while in almost half the States of the Union a much shorter period is sufficient, in some States only a year.

Sources of Citizenship.—“The amendment,” said Mr. Justice Gray, in *United States v. Wong Kim Ark*,⁴⁷ “contemplates two sources of citizenship and only two, birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of annexation of foreign territory, or by authority of Congress, exercised either by declaring certain classes of persons to be citizens as in the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts.”

Subject to the Jurisdiction thereof.—These words—meaning the jurisdiction of the United States—are of special significance in this connection. They were first construed in relation to this amendment in the *Slaughter House Cases*, subsequently they were considered in other cases. In *Elk v. Wilkins*,⁴⁸ it was held by a majority of the court: “The evident meaning of the words ‘subject to the

⁴⁶ Hare's American Constitutional Law, Vol. 1, 529.

⁴⁷ 169 U. S., 649, 702.

⁴⁸ 112 U. S., 94, 102.

jurisdiction thereof' in the Fourteenth Amendment is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction, and owing them direct and immediate allegiance. And the words relate to the time of birth in the one case, as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by the force of a treaty by which foreign territory is acquired."

The term was also construed in *United States v. Wong Kim Ark*, *supra*, where Mr. Justice Gray said: "The real object of the Fourteenth Amendment of the Constitution, in qualifying the words 'all persons born in the United States,' by the addition, 'and subject to the jurisdiction thereof,' would appear to have been to exclude, by the fewest and fittest words, the two classes of cases—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign State—both of which, as has already been shown, by the law of England, and by our own law, from the time of the first settlement of the English Colonies in America, had been recognized exceptions to the fundamental rule of citizenship by birth within the country."

"In the *Slaughter House Cases* (p. 73), Mr. Justice Miller said: 'The phrase "subject to its jurisdiction," was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States, born within the United States.'

"This was wholly aside," continued Mr. Justice Gray (p. 678), "from the question in judgment, and from the course of reasoning bearing upon that question, it was unsupported by any argument or by any reference to authorities; and that it was not formulated with the same care and exactness, as if the case before the court had called for an exact definition of the phrase, is apparent from its classing foreign ministers and consuls together—whereas it was then well settled law, as has since been recognized by the judgment of this court in which Mr. Justice Miller concurred, that consuls, as such, and unless expressly in-

vested with the diplomatic character in addition to their ordinary powers, are not considered as entrusted with authority to represent their sovereign in his intercourse with foreign States or to vindicate his prerogatives, or entitled by the law of nations, to the privileges and immunities of ambassadors or public ministers, but are subject to the jurisdiction, civil and criminal, of the courts of the country in which they reside.

"That neither Mr. Justice Miller (p. 679), nor any of the justices who took part in the decision of *The Slaughter House Cases*, understood the court to be committed to the view that all children born in the United States of citizens or subjects of foreign States were excluded from the operation of the first sentence of the Fourteenth Amendment, is manifest from a unanimous judgment of the court, delivered but two years later, while all those judges but Chief Justice Chase were still on the bench, in which Chief Justice Waite said: 'Allegiance and protection are, in this connection (that is, in relation to citizenship) reciprocal obligations. The one is a compensation for the other; allegiance for protection, and protection for allegiance.' . . . At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children, born in the country, of parents who were its citizens, became themselves, upon their birth, citizens also. These were natives, or natural born citizens, as distinguished from aliens or foreigners. Some authorities go further and include as citizens children born within the jurisdiction, without reference to the citizenship of their parents. As to this class there have been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient, for everything we have now to consider, that all children, born of citizen parents within the jurisdiction, are themselves citizens.'⁴⁹

The conclusion to be drawn from Mr. Justice Gray's opinion is, that children born in the United States of parents who are foreigners, but permanently residing and engaged in business in this country, but not in a dip-

⁴⁹ *Minor v. Happersett*, 21 Wall., 162, 166, 168.

lomatic or official capacity, are citizens of the United States by virtue of the clause of the Fourteenth Amendment relating to citizenship.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

The language of this clause is directed against the States. It does not apply to persons, either individually or collectively. The Supreme Court in *Virginia v. Rives*,⁵⁰ stated the doctrine to be: "The provisions of the Fourteenth Amendment have reference to State action exclusively, and not to any action of a private individual."

Mode of enforcing the Amendment.—The power of Congress to enforce the amendment is derived from the fifth clause thereof, but the method, or manner, by which it may be enforced is left entirely to Congress. "It may," said the court in *Virginia v. Rives* (p. 318), "enforce the prohibitions whenever they are disregarded by either the legislative, the executive or the judicial department of the State. The mode of enforcement is left to its discretion."

The prohibition against a State making or enforcing any law which shall abridge the privileges of citizens of the United States involves an examination of what are such privileges. This subject we have already discussed, and it is not considered necessary to repeat what has been said, more than to note what is not, or what is, a denial by the States of the privileges and immunities of citizens.

What action by a State is not a denial of the privileges and immunities of citizens under the Fourteenth Amendment.—It is not a denial of such privileges and immunities for a State to regulate the qualifications of jurors, providing no discrimination is made against any class of citizens because of their race; In *re Shibuya Ingiro*,⁵¹ nor to prohibit marriage between whites and blacks; *Ex parte Kinney*,⁵² nor to provide for separate

⁵⁰ 100 U. S., 313, 318.

⁵¹ 140 U. S., 291, 297, 298.

⁵² Fed. Cas. No. 7, 825.

schools for white and colored children;⁵³ nor to require druggists to take out a license to sell liquors;⁵⁴ nor to require railroad companies to fence their roads;⁵⁵ nor to regulate the sale of patents;⁵⁶ nor to fix the hours which shall constitute a day's labor in certain cases;⁵⁷ nor to provide for a succession tax;⁵⁸ nor to tax foreign fertilizers;⁵⁹ but this was held invalid as being a regulation of interstate commerce and as violating Art. I, Sec. 10; nor to regulate the employment of women in certain places;⁶⁰ nor to provide separate coaches for white and colored persons;⁶¹ nor to close business places at certain hours;⁶² nor to prohibit games on Sunday;⁶³ nor to forbid the setting aside of a verdict in certain cases;⁶⁴ nor the passage of a municipal ordinance which regulates public speaking in city parks on the Sabbath;⁶⁵ nor the passage of a law or an ordinance taxing gift enterprises and dealers in stamps;⁶⁶ nor to prohibit the practice of the professions;⁶⁷ nor to require a person to register and declare his intention to become a citizen a prescribed period before voting;⁶⁸ nor to authorize labor unions to organize for proper purposes;⁶⁹ nor to punish the sale of intoxicating liquors.⁷⁰

What action by a State is a denial of the privileges and immunities of citizens under the Fourteenth Amendment.—It is a denial of such privileges for a State to

⁵³ *Ward v. Flood*, 48 Cal., 36, 49; *State ex rel. v. McCann et al.* 21 Ohio State, 198.

⁵⁴ *Gray v. Connecticut*, 159 U. S., 74, 77.

⁵⁵ *Minneapolis et al. v. Emmons*, 149 U. S., 364, 368.

⁵⁶ *Reeves v. Conning*, 51 Fed. Rep., 775, 783.

⁵⁷ *Holden v. Hardy*, 169 U. S., 366, 395.

⁵⁸ *Blackstone v. Miller*, 188 U. S., 189, 207.

⁵⁹ *Am. Hort. Co. v. Agricultural Society N. C.*, 43 Fed. Rep., 609.

⁶⁰ *In re Considine*, 83 Fed. Rep., 157.

⁶¹ *Plessy v. Ferguson*, 163 U. S., 537, 551.

⁶² *State ex rel. v. Judge, etc.*, 39 La. Ann., 133.

⁶³ *State v. Hogreiver*, 152 Ind., 652, 658.

⁶⁴ *Louisville & Nashville R'd. Co. v. Woodson*, 134 U. S., 614, 623.

⁶⁵ *Davis v. Massachusetts*, 167 U. S., 44, 47.

⁶⁶ *Humes v. City of Ft. Smith*, 93 Fed. Rep., 857, 863.

⁶⁷ *In re Lockwood*, 154 U. S., 116.

⁶⁸ *Pope v. Williams*, 193 U. S., 621, 632.

⁶⁹ *United States v. Moore*, 129 Fed. Rep., 631.

⁷⁰ *Bartemeyer v. Iowa*, 18 Wallace, 129, 132.

prohibit the employment of a particular nationality;⁷¹ or pass an act excluding persons from jury service because of their color or race;⁷² or prohibit the use of the national flag as an advertising medium until Congress legislates concerning it;⁷³ or pass a statute providing for weighing coal at the mines under certain conditions.⁷⁴

⁷¹ In re Tiburcio Parrott, 1st Fed. Rep., 481.

⁷² State v. Joseph, 45 La. Ann., 905.

⁷³ Halter et al. v. Nebraska, 205 U. S., 34, 45.

⁷⁴ State v. Peel Splint Coal Co., 36 W. Va., 802.

Concerning the subject of naturalization, Mr. Paterson in his plan of a Constitution provided, "That the rule for Naturalization ought to be the same in every State." Journal, 166.

Had this suggestion been adopted there could have been no such embarrassment or complexity as has grown out of this subject, for no State could have made requirements for naturalization different from those prescribed by the Constitution or Congress, and entire uniformity would prevail on the question throughout the United States, as it should.

CHAPTER LXI.

FOURTEENTH AMENDMENT, CONTINUED.

Nor shall any State deprive any person of life, liberty or property without due process of law.

"The Constitution," said Chief Justice Waite, in *Munn v. Illinois*,¹ "contains no definition of the word 'deprive' as used in the Fourteenth Amendment. To determine its signification, it is necessary to ascertain the effect which usage has given it, when employed in the same or a like connection." After tracing the history of the use of private property, the Chief Justice further said (p. 125): "Down to the time of the adoption of the Fourteenth Amendment, it was not supposed that statutes regulating the use, or even the price of the use, of private property necessarily deprived an owner of his property without due process of law. Under some circumstances they may, but not under all. The Fourteenth Amendment does not change the law in this particular; it simply prevents the States from doing that which will operate as such a deprivation."

The language of this clause is almost identical with the corresponding clause in the Fifth Amendment, and it is not considered necessary to repeat the discussion of that clause. In *Twining v. New Jersey*, Mr. Justice Moody, in referring to the term, "due process of law," said it appeared in the Fifth Amendment, and, "If any different meaning of the same words, as they are used in the Fourteenth Amendment, can be conceived, none has yet appeared in judicial decision."² In this opinion the learned Justice has given an historical discussion of "due process of law" which he concludes in this language.

"From the consideration of the meaning of the words

¹ 94 U. S., 113, 123-125.

² 211 U. S., 101.

in the light of their historical origin this court has drawn the following conclusions:

"First: What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.

"Second: It does not follow, however, that a procedure settled in English law at the time of the emigration, and brought to this country and practised by our ancestors is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straightjacket, only to be unloosed by constitutional amendments.

"Third: But, consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government."

A statute which required corporations to produce their books for examination and also required the officers and employes of the corporation to testify in order to determine if the laws of the State had been complied with, is not a violation of the due process clause of the amendments.⁴ As there is little or no difference in the meaning of "due process of law" under the two amendments so there is little if any difference in the meaning of the word "liberty" in the amendments.

No term in the Constitution is more generally misunderstood than the term "liberty." In common understanding it is largely taken to mean one's right to do, to act, to speak, and to write just as one chooses irrespective of the effect such conduct may have on others. Such a conception of liberty is erroneous and harmful. There is no authority in the Constitution of

³ 211 U. S., 100, 101.

⁴ *Hammond Packing Co. v. Arkansas*, 212 U. S., 323, 348.

the United States for defining liberty to mean unrestrained personal conduct, but on the contrary it means conduct subject to law. Society, or the State, has the right to enact laws, for its government and it is no deprivation of one's liberty to require him to act in conformity with such laws. Liberty is the right to exercise the broadest and fullest individual conduct consistent with established law. There are many rights a person is entitled to enjoy which no law would be justified in interfering with, but these are rights which are consistent with good order and good government and which tend to secure the safety and peace of the public. No law is acceptable to all upon whom it operates. However beneficent it may be there will always be some who will oppose it and assert that it limits their personal liberty. But should the law for that reason be abandoned or would it for that reason be safe for the public to become indifferent to its enforcement? Liberty under the Constitution means the right to conduct one's self in any manner consistent with law.

In *Allgeyer v. Louisiana*,⁵ it was held: "The liberty mentioned in the Fourteenth Amendment means not only the right of a citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will, to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

To the same effect are the decisions in the State courts. In *State v. Peel Splint Coal Co.*⁶ Brannon, J., held: "The word 'Liberty,' as used in the Fourteenth Amendment, does not mean simply exemption from bodily imprisonment, but liberty and freedom to engage in lawful business, and to make lawful contracts therein, to the ends of earning a livelihood for self and family, and of acquiring and enjoying property, and of obtaining happiness.

⁵ 165 U. S., 578-589.

⁶ 36 West Va., 856.

"Elsewhere this great right is recognized in the Constitution by the provision that contracts made in its exercise shall not be impaired. It is a privilege essential to earn bread and secure happiness. Vain would be the pursuit of happiness if the right of contract necessary to secure the bread of life, and raiment and home were taken away. Scarcely any of the great cardinal rights are more universally recognized and vindicated under our system, indeed under all civilized governments, than this right of contract. A man must have the right to exercise his skill and talents and dispose of and use his labor and property, and lawful pursuits as to him shall seem proper. The property right may be violated by prohibiting its full use to the owner as effectually as by taking it from him, his ownership being thus damaged."

Again in *State v. Goodwill*,⁷ it was held: "The term 'liberty,' as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person, as by incarceration, but is deemed to embrace the right of a man to be free in the enjoyment of faculties with which he has been endowed by his Creator, subject only to the restraints which are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties, in all lawful ways, to live and work, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." And such is the whole current of decisions on this clause, both Federal and State.

The whole doctrine was admirably epitomized by Mr. Justice Swayne in his dissenting opinion in the *Slaughter House Cases*: "Liberty is freedom from all restraints but such as are justly imposed by law. Beyond that line lies the domain of usurpation and tyranny."⁸

What are not violations of this clause of the Amendment.—The right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty, and the right, ordinarily, of

⁷ 33 West Va., 179.

⁸ 16 Wall., 127.

free transit from or through the territory of any State is a right secured by the Fourteenth Amendment and by other provisions of the Constitution.⁹

It is only in exceptional cases that a Federal court or judge may sometimes interfere by *habeas corpus* in advance of final action by the authorities of the State. Such cases are those of great urgency which require to be promptly disposed of,—“those which involve the authority and operation of the General Government, or the obligations of this country to, or its relations with, foreign nations.” This rule applies to a case where a party contended that his commitment under a statute of a State deprived him of liberty without due process of law in violation of the Fourteenth Amendment. In such case the Federal court did not have jurisdiction.¹⁰

In *Raymond v. Chicago Packing Company*, Mr. Justice Peckham remarked: “The Fourteenth Amendment is not confined to the action of the State through its legislative, its executive, or judicial departments, but covers all the instrumentalities by which the State acts, and whoever by virtue of public position in a State Government, deprives one of any right protected by the amendment, violates it, and if he acts in the name of the State and for the State and is clothed with the State’s authority, his act is that of the State. It was accordingly held that action by a State board of equalization was reviewable in the Federal courts on the petition of one who claimed that he had been deprived of his property under the provisions of the Fourteenth Amendment without due process of law and had been denied the equal protection of the law.”¹¹

In a classification for governmental purposes under the Fourteenth Amendment it is impossible that there should be an *exact* exclusion or inclusion of persons and things and so long as there is no substantial and fair ground for charging that a statute makes an unreasonable and unfounded general classification and denies to any person the equal protection of the laws, the act will be sustained.¹²

⁹ *Williams v. Feers*, 179 U. S., 274.

¹⁰ *Urquhart, Sheriff, v. Brown*, 205 U. S., 179-183.

¹¹ 207 U. S., 20-36.

¹² *Ozan Lumber Co. v. Union County Bank*, 207 U. S., 256.

A State legislature in attempting to regulate business within the State is authorized to make distinctions depending upon the evil to be remedied, and a statute which required the manufacturers and vendors of paints, which were mixed, to label the ingredients composing them, was not in violation of the Fourteenth Amendment, and did not deprive such manufacturers of their property or rights, or of due process of law, or equal protection of the laws, because the statute of the State did not also apply to another kind of paint.¹³

A statute of Oregon provided that no female should be employed in any manufacturing establishment, or foundry, or laundry, in that State more than ten hours during any one day and that the hours of work might be so arranged that females should not work more than ten hours in any twenty-four hours. The act made a violation of these provisions punishable by fine. The defendant was convicted of violating this statute and the case was taken to the Supreme Court of the United States upon the ground that the State statute violated the Fourteenth Amendment. In passing upon this question Mr. Justice Brewer said:

"This court has more than once declared that the general right to contract in relation to one's business is part of the liberty of the individual, and is protected by the Fourteenth Amendment; but it is equally well settled that this liberty is not absolute and that it does not extend to all contracts, and that a State may, without conflicting with the provisions of the Amendment, in many respects restrict the individual's power of contract."

The right of a State to regulate the numbers of hours which women shall work a day is based upon the police power of the State, and an act of a State which provides that a woman shall work not more than ten hours out of twenty-four does not violate any provision of the Fourteenth Amendment.¹⁴

A State in providing punishment for crimes committed

¹³ Heath et al. v. Worst, 207 U. S., 338, 355, 356.

¹⁴ Muller v. Oregon, 208 U. S., 412-418. Allgeyer v. Louisiana, 165 U. S., 578, Holden v. Hardy, 169 U. S., 366, Lochner v. New York, 198 U. S., 45.

within it may provide for an indeterminate sentence as a punishment for an offense, and such legislation does not violate the Fourteenth Amendment. Neither does this amendment limit the powers of a State in dealing with crime committed within its borders or with the punishment thereof, although a State has no power to deprive any particular person or class of persons of equal and impartial justice under the law.¹⁵

So a colored person who is being tried under an indictment cannot demand, under the Fourteenth Amendment, a jury composed entirely of his own race; nor can an evasion of the provisions of that amendment be inferred from the fact that no colored persons are on the jury, but where the question is raised it must be proved by evidence, or by an offer to prove it by evidence.¹⁶

A provision in a State statute which prohibits the combination of insurance companies concerning rates, etc., and the manner of transacting business is not unconstitutional as in violation of the Fourteenth Amendment. "Statutes," said Mr. Justice Holmes, "prohibiting combinations between possible rivals in trade may be constitutional."¹⁷

Thus a State statute under which witnesses were compelled to give evidence concerning violations of the law and which granted immunity from prosecution for violations which were testified to is not in conflict with the Fourteenth Amendment, because it does not grant immunity from federal prosecution.¹⁸

Nor deny to any person within its jurisdiction the equal protection of the laws.

This great and sublime provision is of comparatively modern origin, and its crystallization into a constitutional provision is found for the first time in the Fourteenth

¹⁵ *Ughbanks v. Armstrong*, 208 U. S., 481, 487.

¹⁶ *Martin v. Texas*, 200 U. S., 316-320.

¹⁷ *Carroll v. Greenwich Ins. Co.*, 199 U. S., 401, 409. *North-ern Securities Co. v. United States*, 193 U. S., 197, *Swift & Co. v. United States*, 196 U. S., 375, *Smiley v. Kansas*, 196 U. S., 447, *National Cotton Oil Co. v. Texas*, 197 U. S., 115.

¹⁸ *Jack v. Kansas*, 199 U. S., 372, 381.

Amendment. It was part of the first section of the article reported by the majority of the Committee on Reconstruction. More than six hundred decisions of Federal and State courts of final resort have been reported in which this section has been construed. It would be wholly impracticable to examine and distinguish them in the compass of this work.

Charles Sumner, in his great argument in the case of *Roberts v. the City of Boston*,¹⁹ traced the origin and growth of this clause and showed that in remote periods equality existed only as a sentiment. Perhaps its earliest recognition is in a letter of Seneca on the contemplation of death, where that pagan philosopher said: "The chief part of equity is equality." "It was not," says Mr. Sumner, "until the truths of the Christian religion enunciated it with persuasive force. When the Saviour gave us the Lord's Prayer, he taught the sublime doctrine of human brotherhood, unfolding the equality of men."

Government, as it was established in the early history of mankind, was reluctant to acknowledge or recognize this doctrine. Countries whose rulers inherited their thrones, whose word was as an eternal law, where nobility existed and was perpetuated by birth, where caste was freely recognized and strictly upheld, were not inclined to favor the doctrine of the equality of manhood. So it continued through the middle ages. "The boldest political reformers of early times," says Mr. Sumner, "did not venture to proclaim this truth, nor did they truly perceive it." It is to France that we must look for the first public declaration of equality of men. There we find the doctrine first asserted in the *Encyclopedie* of Diderot and D'Alembert, published in 1775, which says: "Natural equality is that which exists between all men by the constitution of their nature only. This equality is the principle and the foundation of liberty." Explaining the idea of equality, Mr. Sumner says: "It is a growth like all moral and political ideas. First appearing as a sentiment, they awake a noble impulse, filling the soul with generous sympathy, and encouraging to congenial effort. Slowly recognized they finally pass

¹⁹ 5 Cushing, 198.

into a formula, to be acted upon, to be applied, to be defended in the concerns of life as principles."²⁰

It can easily be believed that the spirit of liberality and justice, the conception of the natural and equal rights of men, and the bold assertion of the equality of men before the law, as first announced in France, had its effect upon the members of the Colonial Congress, and upon the genius, feeling and impulse of the author of the Declaration of Independence. The expression, "We hold these truths to be self-evident, that all men are created equal," was a reflex of the sublime and patriotic sentiment of Diderot and D'Alembert expressed some years before. That such sentiment took firm root in the feelings of the people who were forming the infant republic beyond the seas, and which was destined to become the most powerful factor in human government, is plainly apparent from every page and line of our national history. If the record of the American people teaches anything, it is that the idea of liberty was always supreme with them. Unfortunately for that idea, when our government was established we found slavery here, preceding the establishment of the government. But our early fathers wrote freedom into the Declaration of Independence, and in the Constitution fixed the period after which Congress could prohibit the importation of a person for the purpose of slavery, and authorized that body to impose a per capita tax on the importation, before the period of prohibition, thus hoping to exterminate the institution in the very dawn of our national birth. That we could not do so proved the misfortune of our republic, but the spirit of liberty did not rest until almost a century after the establishment of the republic, when liberty became supreme in every State of the Federal Union. Then, when writing what was almost a new Declaration of Independence, the nation's opportunity occurred to put into the organic law of the land that "no State should deny to any person within its jurisdiction the equal protection of the laws."

Yet the beneficent principle of the equality of manhood as set forth in that Declaration has occasionally been challenged by statesmen in our own country. Mr.

²⁰ Works of Charles Sumner, vol. 2, 336.

Calhoun expressly denied it and strongly censured Mr. Jefferson for inserting it in the Declaration.²¹ At a later period, in a passionate and almost inflammatory speech in the Senate, Senator Pettit treated it with derision.²² Even Rufus Choate, one of the brightest ornaments of New England, whose marvelous eloquence is still potent, wrote flippantly of the "doctrine of human rights gathered out of the Declaration of Independence," which he described as, "that passionate and eloquent manifesto of a revolutionary war," and also wrote of "the glittering and sounding generalities of national right which make up the Declaration of Independence."²³

Judicial construction of "equal protection of the laws."
—Like other provisions of the Fourteenth Amendment, this clause was first brought under judicial review in the *Slaughter House Cases*,²⁴ where Mr. Justice Miller dismissed it with a few lines: "In the light of the history of these amendments, and the pervading purpose of them; which we have already discussed, it is not difficult to give a meaning to this clause. The existence of laws in the States where the newly emancipated negroes resided, which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden.

"If, however, the States did not conform their laws to its requirements, then by the fifth section of the article of amendment Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary

²¹ The speech of Mr. Calhoun not only severely criticized Mr. Jefferson for inserting the provisions in reference to the equality of man in the Declaration of Independence, but also denounced that portion of the Ordinance of 1787 prohibiting slavery in the Northwest Territory; and also said that the doctrine of the equality of manhood had been one of the greatest barriers to the progress of liberty and civilization. Calhoun's Works, vol. 4, 507, 511.

²² Cong. Globe, 33d Cong., 1st Sess. Appendix, vol. 29, 214.

²³ Works of Rufus Choate, vol. 1, 214, 215.

²⁴ 16 Wallace, 81.

for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands. We find no such case in the one before us, and do not deem it necessary to go over the argument again, as it may have relation to this particular clause of the amendment."

This is all Mr. Justice Miller had to say upon this great provision of the amendment. That portion of his opinion in which he says, "We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision," shows that the learned Justice did not comprehend the far-reaching power of this clause. It is this expression, perhaps more than any other, which has subjected his opinion to much adverse criticism. One author says, when referring to the words of Mr. Justice Miller: "That which is undoubtedly the true doctrine has been developed by the decisions since the date of the above statement."²⁵ Mr. Justice Brown, in *Holden v. Hardy*,²⁶ in referring to this clause of the opinion says: "A majority of the cases which have since arisen have turned not upon a denial to the colored race of rights therein secured to them, but upon alleged discriminations in matters entirely outside of the political relations of the parties aggrieved." And this idea is certainly justified by the vast number of cases which have been brought in the courts under this clause.

Purpose and design of this clause.—In the examination of this subject there meets us at the very threshold the question, what was the design and purpose of Congress in embodying that no State should "deny to any person the equal protection of the laws?" in the amendment. What is it that the amendment was meant to accomplish?

*Barbier v. Connolly*²⁷ is perhaps the leading case upon

²⁵ Russell on Police Power, 72.

²⁶ 169 U. S., 382.

²⁷ 113 U. S., 27, 31.

this question and seems to cover every phase of it. "The Fourteenth Amendment," says Mr. Justice Field, who wrote the opinion, "in declaring that no State 'shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burden should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

Again in *Pembina Mining Co. v. Pennsylvania*,²⁸ it was held: "The inhibition of the amendment that no State shall deprive any person within its jurisdiction of the equal protection of the laws was designed to prevent any person or class of persons from being singled out as a special subject for discriminating and hostile legislation."

The word "*person*" in this clause includes corporations as well as individuals. In *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis*,²⁹ this principle is stated as follows: "It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to

²⁸ 125 U. S., 181, 188.

²⁹ 165 U. S., 160, 164.

the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens."

Nor is the word "person" in the amendment limited to public corporations, but it includes private corporations.³⁰ A corporation, whether foreign or domestic, would be held to be a person within the meaning of this clause.³¹ The kind of corporation does not in any respect change the rule. Whether it is a railroad, telegraph, telephone, or other corporation, the rule is the same. Any private corporation within the State or any foreign corporation organized for any legal purpose and doing business within a State and thereby subjecting itself to the jurisdiction of the State would be within the meaning of the word "person."

Any agency authorized to transact business—and entitled to service of process and subject to service of process—would on principle be entitled to the equal protection of the laws, as coming within the term "person."

It is not a denial of the equal protection of the laws for an act of a State legislature to place a nonresident domestic corporation within that State, and all foreign corporations which do business in that State, on an equality in the matter of process in the courts and to make one of the State officers the attorney in fact of these corporations for the purpose of accepting service, but such a classification is reasonable.³²

A statute of a State provided that every president, etc., of any banking company who should embezzle, abstract, or wilfully misapply any of the money, etc., of the company, or who should, without authority from the directors, issue any certificate of deposit, etc., with intent to injure or defraud the company, or to deceive any officer of the company, or any agent appointed to inspect the affairs of any banking company in the State, should be guilty of an offense, and upon conviction, etc., should be punished. A man having been convicted under this statute, it was claimed that the statute was in con-

³⁰ *Charlotte R. R. v. Gibbes*, 142 U. S., 386, 391.

³¹ *Black v. Caldwell*, 83 F. R., 880, 885.

³² *St. Mary's Petroleum Co. v. West Virginia*, 203 U. S., 183-191.

flict with the equal protection clause of the Fourteenth Amendment, on the ground that it applied only to certain officers and that such a classification was not permissible.

The Supreme Court of the United States in *Bachtel v. Wilson*,³³ held, that the words, "any banking company," applied to every banking company in the State regardless of the statute under which the bank was organized, and consequently there was no violation of the equal protection of the laws. The Fourteenth Amendment, it was held (p. 41), was not designed to prevent all exercise of judgment by a State legislature of what the interests of the State require and to compel it to run all its laws in the channels of general legislation. It may deem that social and business conditions, without penal legislation, afford ample protection to the public against wrong-doing by certain officials, while such legislation may be deemed necessary for like protection against wrong-doing by other officials charged with substantially the same duties. The selection, in order to become obnoxious to the Fourteenth Amendment must be arbitrary and unreasonable, not merely possibly, but clearly and actually so. So a State statute does not deny equal privileges to citizens of other States, within the equal protection clause of the Fourteenth Amendment, if those citizens are as free as the citizens of the State passing the act, to do things which the act regulates.³⁴

Where a statute provided, "Every person summoned as a grand juror in any court of this State, who shall be above the age of twenty-one and under the age of sixty-five years; and any person who shall be summoned to serve as a grand juror, who is not so qualified, it shall be good cause of challenge, provided that no exception to any such grand juror on account of his age, shall be allowed, after he has been sworn or affirmed." A. was indicted for murder by a grand jury which was empaneled before the crime was committed. Two of the grand jurors were above the age of sixty-five years. A. was denied the right to challenge them and this he claimed deprived him of the equal protection afforded

³³ 204 U. S., 38, 39, 41.

³⁴ *Hudson County Water Co. v. Attorney General*, 209 U. S., 349, 357.

by the Fourteenth Amendment, by classifying the jurors. But the Supreme Court of the United States held otherwise and said, that it was lawfully within the power of the State to classify persons accused of offenses into classes and that as long as there was no discrimination among the classes it did not amount to a denial of the equal protection of the laws, because one class did not have the same right of challenge of the grand jurors as the other class had.⁵⁵ A statute which limits the height of buildings in different parts of a city does not violate the equal protection clause of this amendment.⁵⁶

The power of taxation under this clause.—Taxation is the most potent agency in civil government. It affects the nation, the state, the county, the municipality, and every division of the government, and the individual member of society, more directly than any power exercised under the law. The power to levy taxes should be most carefully guarded, and those charged with the duty of making the levy should exercise the power in strict pursuance of the statute.

Line between State and Federal Courts on subject of Taxation.—The rule laid down by the Supreme Court in *Kirtland v. Hotchkiss*,⁵⁷ is very important as fixing the line beyond which the federal courts can not go in giving relief from State taxation. Mr. Justice Harlan delivered the opinion, saying: "It may be regarded as the established doctrine of this court, that so long as the State, by its laws, prescribing the mode and subjects of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized, or secured, by the Constitution of the United States, this court, as between the State and its citizen, can afford him no relief against State taxation, however unjust, oppressive, or onerous. . . . It is for the State (p. 499) to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department

⁵⁵ *Lang v. New Jersey*, 209 U. S., 467-472.

⁵⁶ *Welch v. Swasey et al.*, 214 U. S., 91, 107, 108.

⁵⁷ 100 U. S., 491, 498, 499.

of the Federal government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the Federal Constitution."

In *Bell's Gap R. R. Co. v. Pennsylvania*,⁸⁸ Mr. Justice Bradley, in speaking of this clause in the amendment, remarked: "It was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rate of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature, or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

⁸⁸ 134 U. S., 237.

A State is not prevented by this amendment from properly adjusting its system of taxation, or imposing different rates of taxation upon different trades and businesses. Imposing a license tax upon packing houses was not an arbitrary or unreasonable classification, and was not void under the amendment.³⁹

Taxation classified.—For the purpose of aiding proper and just taxation, a State may classify the property which it desires to tax, and the rule of equality, as the court said in the *Kentucky Railroad Tax Cases*,⁴⁰ "Only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances. There is no objection, therefore, to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained. The different nature and uses of their property justify the discrimination in this respect which the discretion of the legislature has seen fit to impose."

Classification of property for taxation.—In the above case it was held (p. 339): "The right to classify railroad property, as a separate class, for purposes of taxation grows out of the inherent nature of the property, and the discretion vested by the Constitution of the State in its legislature, and necessarily involves the right, on its part, to devise and carry into effect a distinct scheme, with different tribunals, in the proceeding to value it. If such a scheme is due process of law, the details in which it differs from the mode of valuing other descriptions and classes of property cannot be considered as a denial of the equal protection of the laws."

In determining questions of constitutional law, the long established habits of a community play a part as well as grammar and logic. It was claimed that land which was encumbered by a mortgage should not be taxed at its full value, but that the amount of the mortgage should be deducted from the tax valuation of the property. The Supreme Court of the United States held otherwise and said that notwithstanding the mortgage the land should

³⁹ *Armour Packing Co. v. Lacey*, 200 U. S., 227.

⁴⁰ 115 U. S., 321, 337.

be taxed at its full value and that such a rule of taxation did not violate the due process clause of the Fourteenth Amendment.⁴¹

This amendment, said Mr. Justice Field, does not prevent the classification of property for taxation—subjecting one kind of property to one rate of taxation, and another kind of property to a different rate—distinguishing between franchises, licenses and privileges, and visible and tangible property, and between real and personal property. Nor does the amendment prohibit special legislation. Indeed, the greater part of all legislation is special, either in the extent to which it operates, or the objects sought to be obtained by it. And when such legislation applies to artificial bodies, it is not open to objection if all such bodies are treated alike under similar circumstances and conditions, in respect to the privileges conferred upon them and the liabilities to which they are subjected.⁴²

A statute passed by the General Assembly of Kansas provided that "Every railroad company organized, etc., should be liable for damages done to any employee in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employes, to any person sustaining such damage." It was claimed in *Missouri Ry. Co. v. Mackey*,⁴³ that this act deprived the railroad companies of the equal protection of the laws, but Justice Field, in delivering the opinion of the court, said: "This claim seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. . . . Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the

⁴¹ *Paddell v. City of New York*, 211 U. S., 446-450.

⁴² *Home Ins. Co. v. New York*, 134 U. S., 594, 606; *St. Louis, Iron Mountain & S. Ry. v. Paul*, 173 U. S., 404.

⁴³ 127 U. S., 205, 209.

clause of the Fourteenth Amendment requiring equal protection of the laws. . . . A law giving to mechanics a lien on buildings constructed or repaired by them, for the amount of their work, and a law requiring railroad corporations to erect and maintain fences along their roads, separating them from land of adjoining proprietors so as to keep cattle off their tracks, are instances of this kind. Such legislation is not obnoxious to the last clause of the Fourteenth Amendment if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

Taxation of inheritances.—Such taxes are not a violation of the equality clause of this amendment. Under an act of the General Assembly of Illinois inheritances were taxed at different rates,—a given rate for a certain amount which was inherited and a greater rate for a certain other amount, and so on. It was claimed that this act was a violation of the equal protection clause of the Fourteenth Amendment. But in *Magoun v. Illinois Trust & Savings Bank*,⁴⁴ the law was sustained, the court saying: "The equality rule of the Fourteenth Amendment does not require, as we have seen, exact equality of taxation. It only requires that the law imposing it shall operate on all alike under the same circumstances. The tax is not on money; it is on the right to inherit; and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat all alike under the circumstances and conditions both in the privilege conferred and the liabilities imposed."

Trial in criminal cases by a jury of less than twelve is not a denial of equal protection of the laws.—The Constitution of Utah provides, "In capital cases, the right to trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdic-

⁴⁴ 170 U. S., 283, 300.

tion, a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict." Also, that "prosecutions shall be by information or indictment, found by a grand jury of seven, five of whom must concur therein." The Supreme Court of Utah twice held that these provisions did not conflict with the Fourteenth Amendment.⁴⁵ Limitations imposed on the powers of government by the Constitution of the United States are upon that government alone, unless the States are mentioned. Judge Cooley states the principle as follows, "The States may if they choose provide for the trial of all offences against the States as well as for the trial of civil cases in the State courts, without the intervening of a jury, or by some different jury from that known to the common law."⁴⁶ This doctrine was also announced by the Supreme Court of the United States in *Maxwell v. Dow*, where the decisions in the Utah cases were affirmed and it was held that the expression "due process of law," as used in the Fourteenth Amendment, did not require that prosecutions under the Constitution of Utah should be by indictment of a grand jury—following the decision of *Hurtado v. California*, 110 U. S. 516, where the same doctrine had been announced sustaining the validity of the constitution of California.

It was also held in *Maxwell v. Dow*, that a conviction by a jury composed of eight members instead of the common law jury did not deprive the defendant of his liberty nor abridge his privileges and immunities under the Fourteenth Amendment, and that it was for a State to decide for itself what number should constitute a jury and as long as all persons in the State were subject to the same procedure there was no denial to a defendant of the provisions of the Fourteenth Amendment.⁴⁷

Under the doctrine that there is no conflict between the constitutions of California and Utah and that of the United States, in providing that an indictment by a grand jury is not necessary in a State court, and that

⁴⁵ *State v. Carrington*, 15 Utah, 480; *State v. Bates*, 14 Utah, 293.

⁴⁶ Cooley's *Constitutional Limitations*, 6 ed., 29, 30.

⁴⁷ *Maxwell v. Dow*, 176 U. S., 581-585-604.

a jury in criminal cases may consist of less than twelve, any State coming into the Union, or any State now in the Union, by amendment of its Constitution can adopt these provisions.

Test of Classification.—"It is apparent," says Justice Brewer, "that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."⁴⁸

So in *Missouri v. Lewis*,⁴⁹ Mr. Justice Bradley held: "The restriction in the amendment, as to the equal protection of the laws, is not violated by any diversity in the jurisdiction of the several courts as to subject-matter, amount, or finality of decision, if all persons within the territorial limits of their respective jurisdictions have an equal right, in like cases and under like circumstances, to resort to them for redress. Each State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government. As respects the administration of justice it may establish one system of courts for cities and another for rural districts, one system for one portion of its territory and another system for another portion. . . . We might go still further (p. 31) and say, with undoubted truth, that there is nothing in the Constitution to prevent any State from adopting any system of laws or judicature it sees fit for all or any part of its territory. If the State of New York, should see fit to adopt the civil law and its method of procedure for New York City and the surrounding counties, and the common law and its method of procedure for the rest of the State, there is nothing in the Constitution of the United States to prevent its doing so. This would not, of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If

⁴⁸ *Gulf, etc., Ry. v. Ellis*, 165 U. S., 150, 165.

⁴⁹ 101 U. S., 22, 30.

every person residing or being in either portion of the State should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

The Amendment does not secure the benefit of the same laws and the same remedies to every person.—In the case last referred to, Mr. Justice Bradley, in his opinion, continues: "The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two States separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each State prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several States without violating the equality clause in the Amendment, there is no solid reason why there may not be such diversities in different parts of the same State. A uniformity which is not essential as regards different States cannot be essential as regards different parts of a State, provided that in each and all there is no infraction of the constitutional provision. . . . If a Mexican State (p. 32) should be acquired by treaty and added to an adjoining State, or part of a State, in the United States, and the two should be erected into a new State, it cannot be doubted that such new State might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard to the welfare of all classes within the particular territory or jurisdiction."

It was claimed that the difference between a general

law of a State relating to the manner in which juries should be made up and a special law for a particular county in that State, providing a different method from the general law, and applicable to that county alone, was a discrimination against the inhabitants of that county and a denial to them of the equal protection of the laws. But the Supreme Court held otherwise in *Gardner v. Michigan*.⁵⁰

In *Armour Packing Co. v. Lacy*,⁵¹ under the classification power, it was held: "The classification of meat packing houses cannot be said to be an arbitrary selection or not to rest on reasonable grounds, and the Fourteenth Amendment was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways, or through the undoubted power of classification to impose different taxes upon different trades and professions." "A tax may be imposed only upon certain callings and trades, for when the State exerts its power to tax, it is not bound to tax all pursuits or all property that may be legitimately taxed for governmental purposes. It would be an intolerable burden if a State could not tax any property or calling unless, at the same time, it taxed all property or all callings."⁵²

The court held, in *St. John v. New York*,⁵³ that a statute providing different regulations as to producing and non-producing vendors of milk was not in violation of the equal protection clause of the Fourteenth Amendment, but that it was within the power of the State, for the purposes of legislation to provide classification which was reasonable and based upon justifiable distinction.

A statute of the State of Texas contained certain regulations relative to the sale of spirituous or vinous liquors, or medicated bitters. Among other things it provided, "the provisions of this chapter shall not apply to wines produced from grapes grown in this State while in the hands of the producers or manufacturers thereof." It was claimed that this provision invalidated the act, as it made a preference in favor of the classes

⁵⁰ 199 U. S., 325, 333.

⁵¹ 200, U. S., 228, 235.

⁵² *Connolly v. Union Sewer Pipe Co.*, 184 U. S., 562.

⁵³ 201 U. S., 633, 636, 637.

named. But a majority of the court, in *Cox v. Texas*,⁵⁴ held that the statute was constitutional, on the ground that "There is no natural distinction of classes among liquor sellers—one class selling their own domestic wines alone, another selling all intoxicants except domestic wine. The statutes regulate the doing of certain things, which presumably all liquor sellers would prefer to be free to do. Therefore, whatever other objections there may be to them they do not deny the equal protection of the laws by forbidding without justification to one what they permit to another class.

"There is only one slight qualification necessary to what we have said. It is true that there is granted to the producers and manufacturers of wine from grapes grown in Texas an immunity in respect of that wine which is not granted to other sellers of the same wine. To that extent, but to that extent alone, favor is shown to a class. But this is not the class discrimination put forward and insisted upon. The attack is not mainly on the distinction between producers and other sellers of domestic wine, but upon that between those producers and the sellers of other wine. The latter, as we have said, is not a true class distinction. Whether there is a difference in the scope of a State's general power to legislate and its power to tax or not, the former does not need an extended defense so far as the Fourteenth Amendment alone is concerned."

It was claimed that a statute which allowed residence property owners to file a protest against the improvement of a street, but which did not allow nonresidents the same right, discriminated against said nonresidents and did not give them the equal protection of the laws, but the court, through Mr. Justice Day, said (p. 621): "It is well settled, that not every discrimination of this character violates constitutional rights. It is not the purpose of the Fourteenth Amendment, to prevent the State from classifying the subjects of legislation and making different regulations as to the property of different individuals differently situated. The provision of the Federal Constitution is satisfied if all persons similarly situated

⁵⁴ 202 U. S., 446, 450, 451.

are treated alike in privileges conferred or liabilities imposed."⁵⁵

Two very important cases on the general subject of the doctrine of classification under this amendment are *Soon Hing v. Crowley*,⁵⁶ and *Yick Wo v. Hopkins*.⁵⁷ Each case grew out of an ordinance of the city of San Francisco regulating the use of laundries. The facts and ordinances in the cases are too lengthy to be set out in detail, but their distinguishing features can be gathered from the portions of the opinion cited in the text. In *Soon Hing* (p. 708), Mr. Justice Field for the whole court laid down this important rule: "The specific regulations for one kind of business, which may be necessary for the protection of the public, can never be the just ground of complaint because like restrictions are not imposed upon other business of a different kind. The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same conditions. It is only then that the discrimination can be said to impair that equal right which all can claim in the enforcement of the laws."

In *Yick Wo v. Hopkins* (p. 373), the following was established as a test: "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Following the doctrine of the last case cited, the Supreme Court, through an opinion by Mr. Justice McKenna, made a very forceful application of the rule in *Williams v. Mississippi*.⁵⁸ The question involved a clause of the constitution of Mississippi which prescribed the qualifications for voters in that State. The opinion quotes from the Supreme Court of Mississippi in the case of

⁵⁵ *Field v. Barber Asphalt Co.*, 194 U. S., 618, 621.

⁵⁶ 113 U. S., 703, 708.

⁵⁷ 118 U. S., 356, 374.

⁵⁸ 170 U. S., 213, 222.

Ratliff, Sheriff, v. Beale (20 So. Rep., p. 865), where it was held: "Within the field of permissible action under the limitations imposed by the Federal Constitution, the convention swept the field of expedience, to obstruct the exercise of suffrage by the negro race." In speaking of the negro race, the Mississippi court said: "By reason of its previous condition of servitude and dependence, this race had acquired or accentuated certain peculiarities of habit, or temperament, and of character, which clearly distinguished it as a race from that of the whites—a patient, docile people, but careless, landless, and migratory within narrow limits, without forethought, and its criminal members given rather to furtive offenses than to the robust crimes of the whites. Restrained by the federal Constitution from discriminating against the negro race, the convention discriminated against its characteristics and the offenses to which its weaker members were prone."

The opinion of Mr. Justice McKenna (p. 222), says: "But nothing tangible can be deduced from this. If weakness were to be taken advantage of, it was to be done 'within the field of permissible action under the limitations imposed by the Federal Constitution,' and the means of it were the alleged characteristics of the negro race, not the administration of the law by officers of the State. . . . It cannot be said, that the denial of the equal protection of the laws arises primarily from the constitution and laws of Mississippi, nor is there any sufficient allegation of an evil and discriminating administration of them."

The court discriminated this case from that of *Yick Wo v. Hopkins*, supra. The gist of the decision is in the closing lines (p. 225): "Though the law itself be fair on its face and impartial in appearance, yet, if it be applied and administered by public authority with an evil eye and unequal hand so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. . . . But it was held that this comment was not applicable to the constitution and statutes of Mississippi because they did not on their face discriminate between the races, and it had not been shown that their

actual administration was evil, only that evil was possible under them.”

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

That portion of the original Constitution (being Article I, Section 2, clause 3) which provided that in the apportionment of representatives those persons formerly held as slaves should be counted as three-fifths of their number is superseded by the first clause of this section. In *Elk v. Wilkens*,⁵⁹ the Supreme Court said: “Slavery having been abolished, and the former slaves made citizens, the clause fixing the apportionment of representatives has abrogated so much of the corresponding clause of the original Constitution as counted only three-fifths of such persons. The reason why Indians not taxed are excluded from the count is because they are not citizens. Their absolute exclusion from the basis of representation, in which all other persons are now included, is wholly inconsistent with their being considered citizens.”

This section of the Amendment is of great importance and is subject to a construction which would have a far-reaching effect. It first provides how representatives in Congress shall be apportioned among the several States: It then says:

⁵⁹ 112 U. S., 94, 102.

“When the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”

It is a matter of history, which will not be questioned, that the framers of the amendment had in mind when they prepared this section those persons who had formerly been slaves. Yet, the language of the amendment furnishes no such evidence. It makes no reference to any particular State or any particular section of the United States. Geography can not determine those who are affected by it. It embraces every State in the Union and applies to each with equal vigor and impartiality. Maine and Mississippi, Oregon and Ohio are equally within its provisions. When “*a State*” is the language of the amendment. No State in the federal Union is excluded. Each State in the federal Union is included. Why the provisions of the section were not limited to the federal officers enumerated, viz.: electors for President and Vice-President of the United States, and Representatives in Congress, does not appear.

It has been suggested, however, by a distinguished member of Congress that as “the Executive of a State, in the discharge of his official duties, may be called upon to appoint a Senator, and as the legislatures of the States elect Senators and form congressional districts and the State judiciary construes election laws, that this was the reason which influenced Congress to extend the provision of the section to them.”⁶⁰ Doubtless this is true. The great purpose of the provision was to preserve to the electors of the State the right to vote for those officers enumerated in this section.

⁶⁰ Speech of Hon. J. W. Keifer in House of Representatives, March 15, 1906.

The language of the section recognizes the *power*, but not the *right* of a State to abridge the right of suffrage. There is a great difference between the exercise of a power and the exercise of a right. Sovereignty can not confer the right to commit a wrong, but it may confer the power to do so. But, if a State should deny its electors the right to vote at any election for any of such officers, or in any way abridge such right, then the section names a punishment which Congress may inflict upon the State for such denial or abridgment, and provides that it shall be a reduction of the State's representation in the national House of Representatives according to the manner provided in the section.

How far may a State go in adopting methods which amount to a denial or abridgment of the right? In other words, what restriction would amount to such a denial or abridgment? Clearly, a State can not deny or abridge the right to vote on account of the race, color or previous condition of servitude of the voter, for this is expressly prohibited in the amendment.

A statute that requires all persons who desire to vote to register their names, residence, age and occupation in a book kept for that purpose a certain number of days before the election, if the provisions as to registration, etc., are reasonable, and which also requires the voter to be able to read three lines from the constitution of the State to show that he is not prompted nor reciting from memory, and which requires him to write his name in a register, has been held an appropriate educational test and within the provisions of the amendment.⁶¹

But, how far could educational tests go without subjecting the State to the penalty of the Constitution? Suppose a State should require a voter to translate three lines in Virgil's *Aeneid* or Xenophon's *Anabasis*; would it be contended that such educational tests could be imposed by a State without offending against the amendment? Again, what if a State legislature should provide that there should be but one voting place in each county, or that the voting places should be open only for one hour on election day, would not such provisions amount to a denial of the right

⁶¹ *Dixon v. State*, 74 Miss., 271, 278; *Stone v. Smith*, 159 Mass., 414.

to vote, or an abridgment of the right to do so? Suppose a State, through its legislature, should declare that only those worth \$100,000 could vote, would not this justify Congress in exercising its right to curtail the State's representation?

Would not any system of voting which a State legislature might prescribe which would deprive the people thereof of the kind of government the federal Constitution contemplates they should have, justify congressional action under this section?

It has been well said, "The power to reduce representation for the disfranchisement of male citizens is the only agency at the command of Congress to secure to the States guaranty of republican government in spirit as well as in form."⁶²

So it has been stated that, "An educational or a property qualification imposed by any State of this Union to the extent of reducing popular representation, and to the destruction of real popular representative government, is as plain an abridgment of the right of suffrage, contrary to the spirit of the Fourteenth Amendment, as an abridgment on account of race, color, or condition. One of these restrictions is as capable of abuse with sinister motives as the other, and it is within the plain power of Congress to consider and deal with both."⁶³

Congress has never exercised the power conferred upon it of reducing the representation of a State in its lower branch, but there can be no question of its power or its right to do so. Of its duty to do so, it alone is the judge. The amendment places the responsibility of enforcing its provisions upon that body.⁶⁴

⁶² Speech of Hon. E. D. Crumpacker, Cong. Globe, vol. 39, pt. 4, 3326.

⁶³ Wise on Citizenship, 232.

⁶⁴ When Senator Williams introduced his amendment in the Senate to the article which had been proposed by the Committee on Reconstruction, Senator Howard of Michigan moved to strike out the words "or in any way abridge," and in support of his motion said:

"I do not know, and I have not been able to find any gentleman who did know, what an abridgment of the right to vote really is. It strikes me it is a misapplication of terms. The right to vote is a unit. It is indivisible, as indivisible as a mathematical point, and as incapable of abridgment. If a man possesses the right to vote he possesses it in its entirety. If he does not possess it, he does

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The purpose of this section is obvious. It was to prevent a person who had formerly taken an oath, as a member of Congress or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, and who subsequently engaged in rebellion against the Government, from holding any of the positions enumerated in the section.

It was held in *McKee v. Young*,⁶⁵ that one might give aid and comfort to an enemy by words of encouragement, or by expressing an opinion, or by feeding the enemy; but it was held in *Privett v. Stevens*,⁶⁶ that service in the Confederate Army did not disqualify one from holding an office enumerated in this section, unless it was voluntary.

The section is now of little importance, as Congress by the act of June 6, 1898,⁶⁷ removed the disabilities, as it was authorized to do by the last clause of the section.

not possess it either conditionally, qualifiedly, or at all. He must possess it wholly or not at all. I am not able to see how this right can be abridged. It seems to me this language is introducing confusion and uncertainty into our constitutional amendment. It is an invitation to raise questions of construction, and it will be followed, in my humble judgment, and as I fear, with an unending train of disputations in courts of justice and elsewhere, and there is no possibility of foreseeing what in the end will be the decision of the Supreme Court as to the meaning of the language 'or in any way abridge.' To me it is incomprehensible." Cong. Globe, Pt. 4, 1st Sess., 39th Cong., 3039.

⁶⁵ 2 Bart. Election Cases, 422.

⁶⁶ 25 Kans., 275.

⁶⁷ 30 Statutes at Large, 432.

Trial of Jefferson Davis for treason.—Under this section a motion was made in *United States v. Jefferson Davis*,⁶⁶ to quash the indictment. The indictment charged that Davis was guilty of treason "in levying war against the United States." A statement and motion was made in behalf of the defendant that "prior to such insurrection and rebellion, and in the year 1845, the said defendant was a member of the Congress of the United States, and as such member took an oath to support the Constitution of the United States in the usual manner and as required by law in such case," and the defendant alleges in bar of any proceedings upon said indictments, or either of them, the penalties and disabilities denounced against and inflicted on him for his said alleged offense by the 3d section of the 14th article of the Constitution of the United States, forming an amendment to said Constitution." And he insists that any judicial proceeding to inflict any other or further pain, penalty, or punishment upon him for such alleged offense is not admissible by the Constitution and the laws of the United States."

On behalf of the United States it was admitted that the defendant had been a member of the Congress of the United States in the year 1845, and had taken the oath which such members usually take, but it was denied that the provisions of the third clause of the Fourteenth Amendment barred the government from proceeding to try the said defendant upon the indictment. The case was argued by counsel upon both sides, after which Chief Justice Chase announced that the court failed to agree upon a decision in regard to the motion to quash the indictment, and thereupon a certificate of disagreement was certified to the Supreme Court of the United States. Before the case could be heard there the proclamation of general amnesty issued by the President of the United States prevented any further criminal prosecution.

At a later term of the Circuit Court at Richmond, Virginia, the indictments against Mr. Davis were dismissed on motion of his counsel.

The report of the case shows that Chief Justice Chase instructed the reporter to record him as having been of the

⁶⁶ Chase's Decisions, 1, 84, 85, 124.

opinion that the motion to quash the indictment should have been sustained and that all further proceedings should have been barred as the result of the Fourteenth Amendment to the Constitution.

It is to be regretted that the Supreme Court did not have an opportunity of passing upon the question raised by the certificate of disagreement. The decision would have been of importance and interest to the country. There has been no adjudication by that court of the exact question which the certificate presented, and it is not probable that such a question will arise again.

The words "engaged in," as found in this section, have been held to imply a voluntary assistance in aid of a rebellion. So that if a person was forced to join in rebellion or assist in insurrection, he could not be said to have engaged in it within the meaning of this section.⁶⁹

Insurrection was held by Judge Grosscup in his charge to the grand jury, "to be a rising against civil or political authority, the open and active opposition of a number of persons to the execution of a law in a city or State, of so formidable a character as to deny for the time being the authority of the government, even though not accompanied by bloodshed, and not of sufficient magnitude to render success probable. Thus, if any person or persons have wilfully obstructed and retarded the mails, and their attempted arrest for such an offense has been opposed by such a number of persons as would constitute a general uprising in that particular locality, and as threatened for the time being a civil and political authority, there is an insurrection."⁷⁰

A rebellion "Is an insurrection of large extent or long duration; and is usually a war between the legitimate government of a State and portions or parts of the same, who seek to overthrow the government, or to dissolve their allegiance to it, and to set up one of their own. The war of the 'Great Rebellion' in England, and of the rebellion of the Southern States of the United States, may be referred to as examples under this head."⁷¹

⁶⁹ United States v. Powell, 65 North Carolina, 709, 713.

⁷⁰ 62 Fed. Rep., 828, 830.

⁷¹ Martin v. Hortin, 1st Bush., (Ky.).

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

The object of this clause is apparent. It was to put beyond the power to question the validity of the public debt of the United States which was authorized by law and which included debts which were incurred in the payment of pensions and bounties to those who enlisted in the army of the United States for services they rendered in suppressing the rebellion, which debts, the clause says, shall not be questioned. The amendment then prohibits, first, the United States, second, any State, from assuming or paying any debt or obligation which was incurred in aid of the rebellion or insurrection against the government of the United States, and the prohibition also applies to the payment of any claim for the loss or emancipation of any slave. The section then provides that all such debts, obligations and claims,—that is, any debt or obligation incurred in aid of the insurrection or rebellion, or any claim for the loss or emancipation of any slave, shall be absolutely illegal and void.

Suit was brought in 1866 in the courts of Georgia upon a promissory note executed and delivered by the defendant to plaintiff. The defendant pleaded that the "consideration of the note was a slave, and that by the Constitution of Georgia the court is prohibited to take and exercise jurisdiction or render judgment in such cases." To this plea the plaintiff filed a demurrer which was overruled and judgment given for the defendant. The judgment of the court was affirmed by the Supreme Court of the State. The case was taken to the Supreme Court of the United States. It was claimed on behalf of the makers of the note that when the constitution of 1868 was adopted by Georgia that State was not one of the States of the Federal Union, because she had severed her

connection as such and was a conquered territory or province, wholly subject to the power of the United States and that the provision of the Constitution of the United States that no State should pass a law impairing the obligation of contracts, did not then apply to the State of Georgia.

It was claimed that the constitution adopted in 1868 by the people of Georgia was not their free and voluntary act, but was adopted under coercion and under the dictation and direction of Congress, and there was nothing in the federal Constitution to prohibit Congress from impairing the obligation of contracts.

The Supreme Court of the United States held,—Chief Justice Chase dissenting,—against these contentions, saying that Georgia had voluntarily adopted her constitution of 1868, and that at no time during the rebellion was that State out of the Union; that the constitutional obligations of the State were not changed by the Rebellion and, therefore, the State could not pass a law which would impair the obligation of a contract entered into before the Rebellion any more than it could do so then, and that as the note at the time it was made was for a lawful consideration,—slavery at that time being recognized as legal at the place where the note was executed,—was a valid note, and its collection could be enforced.⁷²

In Alabama, which was a slave-holding State, and which attempted to secede from the Union in 1861, a slave was sold, the vendor “warranting the slave to be a slave for life and also warranting the title to him to be clear and perfect.” Later the Thirteenth Amendment to the Constitution of the United States was adopted which ordained that “neither slavery nor involuntary servitude shall exist within the United States,” etc. Suit was brought in the courts of Alabama for the recovery of the amount of the note which was given as the price of the slave. The makers of the note pleaded that the instrument upon which suit was brought was given for a slave and set out a copy of the warranty of the vendor, and further pleaded that soon after the execution and delivery of the note said “negro was liberated by the government

⁷² White v. Hartt, 13 Wallace, 646, 654.

of the United States and that said slave was then alive and was a free man," and the plaintiff ought not to recover. To this defense the plaintiff filed a demurrer which was overruled by the court, and judgment was given for the defendants. The Supreme Court of the United States held—Chief Justice Chase dissenting—that as slavery was recognized as a lawful institution, at the time and place when the note in question was executed, and as the contract could have been enforced at the time it was made in the courts of all the States of the Union, such right was not taken away by the provision of the Thirteenth Amendment, and remanded the cause with directions to proceed according to their judgment.⁷³

Chief Justice Chase, in his dissenting opinion, in this and the preceding case, held that contracts for the purchase and sale of slaves were and are against sound morals and natural justice, and have no support except in positive law, that the laws of the several States, by which alone slavery and slave contracts could be supported, were annulled by the Thirteenth Amendment; as a consequence the common law of all the States was restored to its original principles of liberty, justice and right; that the clause in the Fourteenth Amendment to the Constitution which forbids compensation for slaves emancipated by the Thirteenth Amendment is only to be vindicated on these principles. That clauses in State constitutions, acts of State legislatures, and decisions of State courts, warranted by the Thirteenth and Fourteenth Amendments, cannot be held void as in violation of the original Constitution, which forbids the States to pass any law violating the obligation of contracts.

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.—A section like this is also found in the Thirteenth and in the Fifteenth Amendments. In each instance the section is important, but, because of the greater application of the Fourteenth Amendment, the general discussion of the subject will be made in connection with the present section, though its application will necessarily extend to similar sections in the other amendments.

⁷³ *Osborn v. Nicholson*, 13 Wallace, 655-663.

Congress would probably have had the power to enforce the provisions of the amendment if this section had not been enacted. It is difficult to see why the power of Congress under the amendment, without this section, would not come under the rule established by Chief Justice Marshall nearly a century ago in the great case of *McCulloch v. Maryland*,⁷⁴ where he laid down this basic principle: "The sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Such power on the part of Congress would also seem to fall within the rule established by Mr. Justice Story in *Prigg v. Pennsylvania*,⁷⁵ where, in passing upon the constitutionality of an act of the General Assembly of Pennsylvania, it was held: "The fundamental principle, applicable to all cases of this sort, would seem to be, that where the end is required, the means are given; and where the duty is enjoined, the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted."

This doctrine of implied power was stated perhaps still more strongly by Mr. Justice Gray in *Logan v. United States*,⁷⁶ as follows: "Every right, created by, arising under or dependent upon, the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object."

Notwithstanding the general authority which doubtless

⁷⁴ 4 Wheaton, 316, 421.

⁷⁵ 16 Peters, 539, 615.

⁷⁶ 144 U. S., 263, 293.

resides in Congress to enforce the provisions of this amendment and which proceeds from that power which necessarily flows from the right of Congress to enforce its laws, that body saw fit to include in this amendment, and also in the Thirteenth and Fifteenth Amendments, a provision which expressly confers upon Congress the power to enforce the respective provisions of the amendments. There is, however, a limitation upon the power of Congress contained in the amendments. It is not a general power. The manner in which its enforcement is to be made is contained in the section under consideration and similar sections in the other two amendments. It must be by "appropriate legislation." This naturally suggests the question where does the power reside to determine what is appropriate legislation? Is Congress to be the judge of the appropriateness of its own acts, or is the power vested in the judiciary to determine the question? Fortunately, the question cannot be regarded as any longer open to construction or debate. It rests with the judicial branch of the government to determine what legislation under the amendment is, and what is not appropriate.

When Congress can act.—It is a fundamental principle in the construction of the amendment under consideration that it is a limitation upon the power of the States. It was this principle that led Mr. Justice Bradley, in the Civil Rights Cases,¹⁷ to say: "Until some State law has been passed, or some State action through its officers or agents has been taken, adverse to the rights of citizens sought to be protected by the Fourteenth Amendment, no legislation of the United States under said amendment, nor any proceeding under such legislation, can be called into activity. Of course, legislation may, and should be, provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the amendment was intended to provide against; and that is, State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That

¹⁷ 109 U. S., 3, 13.

would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property (which include all civil rights that men have), are by the amendment sought to be protected against invasion on the part of the State without due process of law, Congress may therefore provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited by the amendment, therefore Congress may establish laws for their equal protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the amendment, they are prohibited from committing or taking."

In *United States v. Sanges*,⁷⁸ Mr. Justice Lamar held: "The provision of the Fourteenth Amendment, authorizing Congress to enforce its guaranties by legislation, means such legislation as is necessary to control and counteract State abridgment."

What may be protected by Congress.—It was held in *Strauder v. West Virginia*,⁷⁹ that "A right or an immunity, whether created by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress." The court said in *United States v. Reese*,⁸⁰ "Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress," and "The form and manner of that protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, and this may be varied to meet the necessities of the particular right to be protected."

⁷⁸ 48 F. R., 78, 87.

⁷⁹ 100 U. S., 303, 310.

⁸⁰ 92 U. S., 214, 217.

When Congress may not act.—In *United States v. Harris*,⁸¹ the broad rule was established that Congress would have no right to enforce the provisions of the amendment in any of the following cases: "When the State has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its departments has deprived any person of life, liberty or property without due process of law, or denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative, and construed by its judicial, and administered by its executive departments, recognize and protect the rights of all persons, the amendment imposes no duty and confers no power upon Congress."

In the great Civil Rights Cases⁸² the question was whether the law of Congress which provided, "All persons within the jurisdiction of the United States shall be entitled to the full and equal enjoyment of the accommodations, advantages, facilities, and privileges of inns, public conveyances on land or water, theaters, and other places of public amusement; subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and color, regardless of any previous condition of servitude," and providing punishment for any person who violated such law, was constitutional.

Mr. Justice Bradley, in speaking of the present clause of the Fourteenth Amendment, said (p. 11) that it authorized Congress "to adopt appropriate legislation for correcting the effects of prohibited State laws and State acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of State legislation; but to provide modes of relief against State legislation, or State action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of State laws, and the action of State

⁸¹ 106 U. S., 629, 639.

⁸² 109 U. S., 3-11, 17.

officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment." The act of Congress was held unconstitutional.

Mr. Justice Bradley further said (p. 17): "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. . . . Hence (p. 17) in all those cases where the Constitution seeks to protect the rights of the citizens against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offenses, but abrogation and denial of rights, which it denounces, and for which it clothes the Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration."

In *Ex parte Virginia*,⁸³ the rule was stated by Mr. Justice Strong to be (pp. 345, 346): "Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and equal

⁸³ 100 U. S., 339, 345, 346.

protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power."

But Congress could not, under this clause, undertake, on the ground that the legislation was appropriate, to interfere with State legislation which was purely domestic.

Chief Justice Fuller⁸⁴ stated the rule to be, "The Four-

⁸⁴ In *re* *Raher*, 140 U. S., 545, 555.

If the genius and labor of one man more than any other can be said to have brought about the passage of this amendment, that man was Thaddeus Stevens, a representative in Congress from Pennsylvania.

The sublime tribute paid to this great and earnest man by Mr. Thorpe for his work in connection with this amendment is inserted here because of its historical value and its characterization of a statesman whose life has not yet been fully appreciated by his countrymen:

"Of the authors of the Fourteenth Amendment the most conspicuous and unflinchingly devoted to its adoption, and to the general welfare of the race for whose benefit it was primarily intended, was Thaddeus Stevens of Pennsylvania. No other member of Congress, unless it be Lyman Trumbull, a Senator from Illinois, was more closely identified with the whole policy of Congress formulated in the Reconstruction Acts and culminating now in the changed Constitution. Certainly no member of the House divided authority with Thaddeus Stevens. He dominated its proceedings throughout the Reconstruction period. Yet at this time he had passed the time of life when most men are glad to retire to well-earned repose. If Lincoln was the Moses of the African race in America, Thaddeus Stevens was its Joshua. He fought its battles with terrible earnestness and routed its foes in hopeless defeat. To him the negro was the helpless ward of the Nation and he guarded his interests with a fatherly watchfulness which never slumbered. He bore the wearisome details and vexations of congressional life with the endurance of the granite hills of his native Vermont.

"Though the Father of the House in years, his tireless energy exhausted its youngest members; and though a cripple and in broken health, he was never known to be absent from duty, whether in committee or as the leader of the House. He clung to its leadership tenaciously. Conscious that his life was drawing swiftly to a close, he was carried to the sessions, daily, in his chair, from which by the courtesy of the House, he seldom arose, though participating with virile vigor in its work. In the long struggle which culminated in the impeachment of President Johnson, it was the irresistible leadership of Thaddeus Stevens that gave power and coherence to the whole movement. He it was, who, on that Tuesday morning in February, entered the Senate Chamber, and in the name of the House of Representatives and of the American people impeached Andrew Johnson, President of the United States, of high crimes and misdemeanors in office; and it was he, who on the part of the House managed the impeachment throughout and was most disappointed at the President's acquittal.

teenth Amendment did not attempt to invest Congress with power to legislate upon subjects which are within the domain of State legislation."

"Throughout the bitter struggle over the return of the southern States to the Union, his lance was never at rest. He knew nothing of compromises; all his measures were radical and as his opponents believed, revolutionary. With his death, which occurred just two weeks after the Fourteenth Amendment became a part of the supreme law of the land, there vanished from Congress the most dominating spirit it had ever known. For twenty years he labored ceaselessly in it on behalf of the negro race. He hated slavery with all the hot intensity of his nature; and he urged the emancipation proclamation as right, just and expedient. He had initiated the Fourteenth Amendment and carried it through. He had formulated the policy of Congress in its four great reconstruction acts, and, to the last moment of his life, he believed that no measure which could be carried out against the southern people could be too severe.

"The grand passion of his life,—the amelioration of the condition of the negro race,—he sought to carry out and make permanent after his death by providing in his will that his estate should become a fund for the care and education of negro children. He selected for his burial place a quiet and secluded spot at Lancaster, where persons of any race might be laid to rest; choosing his grave, as he declared, in the epitaph which he wrote for his tomb, that he might be enabled to illustrate in his death the principle which he had advocated throughout a long life—the equality of men before their Creator. To this uncompromising, political Puritan must be accredited, above any other man, the authorship and the ultimate adoption of the Fourteenth Amendment." Thorpe's Constitutional History of the United States, vol. 3, 402-404.

CHAPTER LXII.

FIFTEENTH AMENDMENT.

Section 1.—The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2.—The Congress shall have power to enforce this article by appropriate legislation.

The ratification of this amendment was certified by Hamilton Fish, Secretary of State, March 30, 1870.

This was the third and last of the three great amendments which grew out of the Civil War, and is the last amendment added to the Constitution. Like its two immediate predecessors, it was adopted in the interest of the colored race. Its authorship is probably due more directly to Mr. John B. Henderson, United States Senator from Missouri, than to any other person. Its history forms an interesting chapter in the history of the government from 1860 to the time it was adopted. In the debate which occurred over the Fourteenth Amendment, Senator Henderson, on March 7, 1867, introduced the following joint resolution, which eventually became this amendment: "That no State shall deny or abridge the right of its citizens to vote and hold office on account of race, color, or previous condition."¹ The resolution also gave Congress the power to enforce its provisions by appropriate legislation. Nothing was done with this resolution until after Congress had adopted the Fourteenth Amendment. On December 7, 1868, Senator Cragin, of New Hampshire, introduced the following resolution on the same subject: "No State shall deny the right of suffrage or abridge the same to any male citizen of the United States twenty-one years of age and upwards, except for participation in rebellion

¹ Congressional Globe, 1st Session, 40th Congress, 1867, 13.

or other crime, and excepting also Indians not taxed; but any State may exact of such citizens a specific term of residence as a condition of voting therein, the condition being the same for all classes."³ On the same day Mr. Pomeroy, a Senator from Kansas, introduced this resolution: "The basis of suffrage in the United States shall be that of citizenship, and all natives or naturalized citizens shall enjoy the same rights and privileges of the elective franchise; but each State shall determine by law the age of the citizen and the time of residence required for the exercise of the right of suffrage, which shall apply equally to all citizens, and also shall make all laws concerning the time, places and manner of holding the elections."⁴ In the House three similar resolutions were moved.

Mr. Kelley, of Pennsylvania, introduced one as follows: "No State shall deny to or exclude from the exercise of any of the rights or privileges of an elector any citizen of the United States by reason of race or color." And Mr. Broomall, of Pennsylvania, moved that: "Neither Congress nor any State by its constitution or laws shall deny or restrict the right of suffrage to citizens of the United States on account of race or parentage of such citizens; and all qualifications or limitations of the right of suffrage in the constitution or laws of any State, based upon race or parentage, are, and are hereby, declared to be void."⁴ Mr. Stokes of Tennessee, proposed the following amendment: "No State shall make or enforce any law which shall deprive any citizen of the right of the elective franchise on account of race or color."⁵

On January 11, 1869, Mr. Boutwell, as chairman of the Judiciary Committee of the House, reported the following joint resolution: "That the following article (two-thirds of both Houses concurring) be proposed to the legislatures of the several States as an amendment to the Constitution of the United States, which, when ratified by three-fourths of said legislatures, shall be held as part of the said Constitution, namely: Section 1. The right of any

³ Cong. Globe, 3d Sess., 40th Cong., 6, part 1.

⁴ Cong. Globe, 3d Sess., 40th Cong., 6, part 1.

⁴ Cong. Globe, 3d Sess., 40th Cong., 9, part 1.

⁵ Cong. Globe, 3d Sess., 40th Cong., 11, part 1.

citizen of the United States to vote shall not be denied or abridged by the United States or any State by reason of the race, color, or previous condition of slavery of any citizen or class of citizens of the United States.

Section 2. The Congress shall have power to enforce by proper legislation the provisions of this article.”⁶ Mr. Shelabarger, of Ohio, offered an amendment to the resolution of Mr. Boutwell as follows: “No State shall make or enforce any law which shall deny or abridge to any male citizen of the United States of the age of twenty-one years or over, and who is of sound mind, an equal vote at all elections in the State in which he shall have such actual residence as shall be prescribed by law, except to such as have engaged or may hereafter engage in insurrection or rebellion against the United States, and to such as shall be duly convicted of treason, felony or other infamous crimes.” But this resolution was defeated by 61 yeas to 126 nays.⁷ The House then passed the Boutwell resolution by a vote of 150 yeas to 42 nays,⁸ which then went to the Senate.

Senator Stewart, chairman of the Committee on Judiciary, acting under instructions of his committee, moved to amend the resolution by striking out the whole of section 1 and inserting the following: “The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.”⁹

Several amendments were offered in place of Senator Stewart’s amendment, but none of them received sufficient support to be adopted, except that of Senator Wilson, of Massachusetts, which he offered as a substitute to Senator Stewart’s amendment, and which provided: “That no discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the exercise of the right to hold office in any State, on account of race, color, nativity, property, education or religious creed.”¹⁰ The Senate,

⁶ Cong. Globe, 3d Sess., 40th Cong., 286, part 1.

⁷ Cong. Globe, 3d Sess., 40th Cong., 744, part 1.

⁸ Cong. Globe, 3d Sess., 40th Cong., 745, part 1.

⁹ Congressional Globe, 3d Session, 40th Congress, 828, part 2.

¹⁰ Thorpe’s Constitutional History, vol. 3, 434.

after some further debate, passed the Wilson amendment by a vote of 31 yeas to 27 nays.¹¹ At this time Senator Morton presented the following resolution as an amendment to the Wilson amendment: "That clause 2, first section of article 2 of the Constitution of the United States shall be amended to read: 'Each State shall appoint, by a vote of the people thereof qualified to vote for representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector; and the Congress shall have power to prescribe the manner in which such electors shall be chosen by the people.' " This amendment was adopted.

The resolution, including the Morton amendment, read as follows: "No discrimination shall be made in any State among the citizens of the United States in the exercise of the elective franchise or in the right to hold office in any State on account of race, color, nativity, property, education or creed. Each State shall appoint, by the vote of the people thereof qualified to vote for representatives in Congress, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector; and the Congress shall have power to prescribe the manner in which such electors shall be chosen by the people."¹² The resolution was then sent to the House of Representatives. That body at once began its consideration, but as the Boutwell resolution which the House had passed had been changed both in substance and form—especially by the addition of the Morton amendment—the House refused its concurrence by a vote of 133 to 37, and a committee of conference consisting of Messrs. Boutwell, Shellabarger and Eldridge was appointed by the Speaker. The Senate did not appoint a committee of conference, but receded from its resolution, though it still refused to agree to the Boutwell resolution. The House

¹¹ Congressional Globe, 3d Session, 40th Congress, 1040, part 2.

¹² Congressional Globe, 3d Session, 40th Congress, 1224, part 2.

adhering to its position and the Senate refusing to concur, the amendment was defeated.¹³

When it was announced in the Senate that the resolution had been defeated, Senator Stewart at once moved that the Senate adopt the joint resolution which had been originally proposed in that body by Senator Henderson. After many substitutes had been offered for this resolution and each in turn defeated, it passed the Senate by a vote of 35 to 11.¹⁴ In the House, Mr. Bingham, of Ohio, moved to amend it so that it would read, "The right of citizens of the United States to vote and hold office should not be abridged or denied by any State on account of race, color, nativity, property, creed, or previous condition of servitude." After debate this amendment was passed, and the resolution as it came from the Senate, and as amended by the House, was then passed. Thereupon the resolution was returned to the Senate and another debate took place, Senator Stewart disagreeing to the House amendment and asking for a conference, which was carried. The President of the Senate appointed Senators Stewart, Conkling and Edmonds as conferees. On the part of the House the Speaker appointed Messrs. Boutwell, Bingham, and Logan. The result of the meeting of the conferees was a compromise, the House substantially receding from its amendment. The resolution, as agreed upon by the conference, was passed by each body, and the President was directed to send the article to the governors of the States for ratification.

The last of the great amendments growing out of the Civil War between the States in America, was thus passed. Since that day, though many amendments have been proposed, none has been added to the Constitution.

This amendment did not confer the right of suffrage.—In *United States v. Reese et al.*¹⁵ the court held: "The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference in this particular to one citizen of the United States over another, on account of race, color, or previous condition of servitude. Before

¹³ Thorpe's Constitutional History, vol. 3, 437, 439.

¹⁴ Congressional Globe, 3d Session, 40th Congress, 1318, part 2.

¹⁵ 92 U. S., 214, 217.

its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, etc., as it was on account of age, property, or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Before this amendment, there was no constitutional guaranty against this discrimination; now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by "appropriate legislation."

The Fifteenth Amendment has reference solely to actions of the United States and the States, and not to any action of private individuals.¹⁶

This Amendment created a new constitutional right.—In *United States v. Cruikshank et al.*,¹⁷ Waite, Chief Justice, said: "In *United States v. Reese*, supra, we held that the Fifteenth Amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from the discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, etc., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been."

In *Elk v. Wilkins*¹⁸ it was held: that an Indian, not being a citizen of the United States under the Fourteenth Amendment to the Constitution, has been deprived, when

¹⁶ *James v. Bowman*, 190 U. S., 127.

¹⁷ 92 U. S., 542, 555. *McPherson v. Blocker*, 146 U. S., 1, 38.

¹⁸ 112 U. S., 94, 109.

prevented from voting, of no right secured by the Fifteenth Amendment, and is, therefore, not entitled to vote.

So in *United States v. Harris*,¹⁹ the court held: "The Fifteenth Amendment does not confer the right of suffrage on any one. It merely invests citizens of the United States with the constitutional right of exemption from discrimination in the enjoyment of the elective franchise on account of race, color, or previous condition of servitude."

But in *ex parte Yarbrough*,²⁰ Justice Miller, speaking for the entire court, said: "The Fifteenth Amendment of the Constitution, by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections, and by its limitation of the power of the United States over that subject, clearly shows that the right of suffrage was considered to be of supreme importance to the National Government, and was not intended to be left within the exclusive control of the States. While it is true, as was said by this court in *United States v. Reese* (92 U. S., 214), that this article gives no affirmative right to the colored man to vote, and is designed primarily to prevent discrimination against him whenever the right to vote may be granted to others, it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where the former slave-holding States have not removed from their constitutions the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because, being paramount to the State law, and a part of the State law, it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which should give the right of voting exclusively to white people, whether they be men or women. (*Neal v. Delaware*, 103 U. S., 370.) In such cases this Fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro the right to vote, and Congress has the power to protect and enforce that right."

This Amendment eliminates the word "white" from

¹⁹ 106 U. S., 629, 637.

²⁰ 110 U. S., 651, 664.

State constitutions in reference to suffrage.—It was said in *Neal v. Delaware*: “Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State constitution, or render inoperative, that provision which restricts the right of suffrage to the white race.”²¹

The doctrine announced in *ex parte Yarbrough*, *supra*, must be considered as a modification of the preceding decisions in reference to the securing of suffrage to the negro. While the Fifteenth Amendment does not in terms confer upon the colored man the right to vote, it removed what had formerly been the obstacles in the way of his doing so, and this was the equivalent of a provision declaratory of his right of suffrage.

Neither the Thirteenth, Fourteenth nor Fifteenth Amendments conferred the right of suffrage upon citizens of the United States or of the States. This was done by Congress.

This concludes our examination of the Amendments which have been made to the Constitution. It is highly praiseworthy to say of that great instrument that so

²¹ 103 U. S., 370, 389.

“Judge Cooley said of this amendment. What is particularly noticeable in the case of this article is the care with which it confines itself to the particular object in view. The pressure of a particular evil was felt; the reproach of a great wrong was acknowledged; and that evil was to be remedied, and that wrong redressed. There was no thought at this time of correcting at once and by a single act all the inequalities and all the injustice that might exist in the suffrage laws of the several States. There was no thought or purpose of regulating by amendment, or of conferring upon Congress the authority to regulate, or to prescribe qualifications for, the privilege of the ballot. From the beginning the States had exercised that authority, and however diverse had been their action, there was no complaint of any resulting evil which in any case had become of national importance except the single one at which this article was aimed. The correction of this was consequently the immediate need, and whatever else was wrong or impolitic might properly be left to the action of the States where the subject was left when the Constitution was framed. At their hands, it may be trusted, will whatever else is unequal in due time be corrected, and whatever is inconsistent with republican institutions be discarded. This last amendment crowns the edifice of national liberty. Freedom is no longer sectional or partial. There are no longer privileged classes; the laws have ceased to be invidious, and all classes of citizens who are to be governed by them are admitted also to participate in their administration.” *Story on The Constitution*, vol. 2, secs. 1972, 1973.

few amendments have been added to it. Praise, however, is equally due to the conservative judgment of the American people, who have been reluctant to change or add to their organic law. While only fifteen amendments to the Constitution have been adopted by Congress and ratified by the States nearly two thousand proposals to amend it have been introduced in Congress. Professor Ames in his admirable treatise on the "Amendments to the Constitution," says: "During the first century of our government's existence over one thousand eight hundred propositions to amend the Constitution were introduced into the National Legislature."²²

It must be conceded that, as the Constitution left the Convention that framed it, it was strangely defective in some particulars. The great safeguards relating to personal liberty and rights—that no person should be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury; that no person should be subject for the same offense to be twice put in jeopardy of life or limb; that no person should be compelled in any criminal case to be a witness against himself; that no person should be deprived of life or limb, liberty, or property, without due process of law; that in all criminal prosecutions the accused should have a speedy and public trial, by an impartial jury; that he should be informed of the nature and cause of the accusation; that he should be confronted with the witnesses against him; that he should have compulsory process in his favor; that he should have assistance of counsel for his defense; that excessive bail should not be required; that excessive fines should not be imposed; that cruel and unusual punishments should not be inflicted—these were omitted from the original Constitution, and are embraced in the fifth, sixth, and eighth amendments. Various reasons why these provisions were omitted from the Constitution have been assigned by statesmen and jurists, some of whom were members of the Constitutional Convention, but whatever may have been the cause, we find them in the amendments, and not in the original instrument.

In a republic like ours it would have been strange in-

²² Ames on Amendments to the Constitution, 19.

deed if our Constitution had omitted the great principles set forth in the original ten amendments. However potent the arguments of Mr. Hamilton, Mr. Wilson, and Mr. Madison, that the Constitution itself was a Bill of Rights and that it was unnecessary to add more on that subject, without these original amendments the Constitution would have been far different from what it is. Had not these articles been incorporated into that great instrument serious consequences might have followed, for in the absence of express provisions which guaranteed these great bulwarks of freedom, it is difficult to tell what rights the people would have had at the end of a century and a quarter of national life.

The first ten amendments were fundamental. They formulated certain great and inherent rights of the people and then embodied them into constitutional provisions. They did not create any new rights, but reduced what had previously been indefinite propositions into comprehensive maxims of constitutional law. It was not so, however, with the next two amendments which were adopted. There was a special cause for each of these. The Eleventh Amendment would probably never have been adopted but for the decision of the Supreme Court in *Chisholm v. Georgia*. The Twelfth Amendment grew out of the presidential contest between Jefferson and Burr. The latest amendments, being the Thirteenth, Fourteenth and Fifteenth, as has been already stated, grew out of the Civil War and were the logical result of that struggle. Not to have adopted them would have been wholly inconsistent with the dominant theory of American liberty. To have fought the war to a successful termination, to have overcome the rebellion and then left those who had formerly been slaves in a helpless condition and without governmental protection would have been at variance with the spirit of the federal Constitution.

Amendments adopted but not ratified.—Besides the amendments to the Constitution which were adopted, four were proposed which passed Congress but failed of ratification by the requisite number of States. Two of these were passed by the first Congress at the same time the first ten amendments were passed. The first one read:

“After the first enumeration required by the first ar-

ticle of the Constitution, there shall be one Representative for every thirty thousand, until the number shall amount to one hundred, after which the proportion shall be so regulated by Congress that there shall be not less than one hundred Representatives, nor less than one Representative for every forty thousand persons until the number of Representatives shall amount to two hundred; after which the proportion shall be so regulated by Congress that there shall not be less than two hundred Representatives nor more than one Representative for every fifty thousand persons."

The second provided: "No law varying the compensation for the services of the Senators and Representatives shall take effect until an election of Representatives shall have intervened."

This amendment was suggested by the Conventions of Virginia, North Carolina and New York at the time they ratified the Constitution. The object was to prevent Congress from increasing the compensation of its members at pleasure.

Various attempts have since been made to secure the adoption and ratification of such an amendment, but they were not successful.

No further amendment to the Constitution was passed by both houses of Congress, until 1810, in the Eleventh Congress, when Senator Reed of Maryland proposed the following:

"If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever, from any emperor, king, prince, or foreign power, such person shall cease to be a citizen of the United States, and shall be incapable of holding any office of trust or profit under them or either of them."

This was not an amendment which proposed to incorporate new matter into the Constitution but its object was to amend one of the original provisions of that instrument. The clause which related to titles of nobility being granted by the United States and which forbade any person holding any office of profit or trust under the United States, without the consent of Congress, ac-

cepting any present, emolument, office or title from any king, prince or foreign state, was not satisfactory to many people.

The state conventions of Massachusetts, New Hampshire and New York each urged a similar amendment. The amendment also proposed that the words, "without the consent of Congress" should be omitted from the Constitution. Neither of these proposed amendments was accepted. Opposition to a similar amendment arose in the first Congress when that body was considering the amendments proposed by Mr. Madison. Three attempts were made to have Congress pass an amendment on this subject, but without success.

While Senator Reed's resolution was pending other amendments were proposed but none of them were accepted and the amendment as above given passed the Senate by a vote of nineteen yeas to five nays and passed the House with but three nays. It failed of ratification by the vote of only one State.

It is difficult to understand at this day the cause of the feeling on this subject. The Constitution prevented the granting of titles by the United States as well as the acceptance of gifts from kings and princes without the consent of Congress. Seemingly that body could have been trusted. President Jefferson, as we have seen, had accepted a bust as a present from the Emperor of Russia but that fact does not seem to have been criticized either by Congress or by the people.

Professor McMaster²³ has assigned, as the reason why such an amendment was desired, the hostile sentiment in the United States towards England and in support of his opinion points to the conduct of some of the States; notably that of Kentucky, when its General Assembly passed a resolution that in the future, "No decision of any British court and no treaty on law by any British author should be cited as authority in any court of that State." Henry Clay was then Speaker of the Kentucky House of Representatives, and although the motion was popular and had the support generally of the members of the assembly and the people of the State, he opposed it, and leaving the Speaker's chair, spoke in opposition to it. Although Clay

²³ McMaster's History, vol. 3, 417, 418.

was the idol of Kentucky, he could do no more than secure an amendment to the resolution which limited its application to legal works which had been written by British authors since the Declaration of Independence.²⁴ The hostility to England had extended to other States. Pennsylvania was quite as demonstrative as Kentucky had been and passed a similar resolution which was in force for twenty years.

The following is the fourth amendment proposed to the Constitution which passed Congress, but failed of ratification:

“No amendment shall be made to the Constitution which will authorize or give to Congress, the power to abolish or interfere, within any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of said State.”

This amendment was proposed by Thomas Corwin, a representative in Congress from Ohio, on February 21, 1861. It passed the House by a vote of one hundred and thirty-three yeas to sixty-five nays. It was strongly opposed in the Senate, but that body approved it by a vote of twenty-four yeas to twelve nays—just the required number. Only three States, however, ratified it, Ohio, Maryland and Illinois, the latter State by a convention called for considering the amendment.²⁵ This is the only instance where a State has ever ratified an amendment through a State Convention.

Nine proposed amendments have passed the Senate and failed in the House and nine have passed the House and failed in the Senate. A recent amendment authorizing the taxation of incomes has passed Congress and is pending before the States. Fifty-four amendments were proposed in the Forty-ninth Congress, forty-eight in the Fiftieth Congress and in the Fifty-second Congress there were seventy-three.²⁶ The number proposed now exceeds two thousand.

²⁴ Schurz, *Life of Clay*, 49, 50.

²⁵ Ames on *The Amendments*, 196.

²⁶ Ames on *The Amendments*, 300.

Appendix No. 1.

DECLARATION OF RIGHTS.

Friday, October 14, 1774.

Whereas, since the close of the last war, the British parliament, claiming a power of right, to bind the people of America by statutes in all cases whatsoever, hath, in some acts, expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these colonies, established a board of commissioners, with unconstitutional powers, and extended a jurisdiction of courts of admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county:

And whereas, in consequence of other statutes, judges, who before held only estates at will in their offices, have been made dependent on the crown alone for their salaries, and standing armies kept in times of peace: And whereas it has lately been resolved in parliament, that by force of a statute, made in the thirty-fifth year of the reign of King Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons, and misprisions, or concealments of treasons, committed in the colonies, and by a late statute, such trials have been directed in cases therein mentioned:

And whereas, in the last session of parliament, three statutes were made; one entitled, "An act to discontinue, in such manner and for such time as are therein mentioned, the landing and discharging, lading, or shipping, of goods, wares, and merchandise, at the town, and within the harbour of Boston, in the province of Massachusetts-Bay, in North America;" another entitled "An act for the better regulating the government of the province of Massachusetts-Bay in New England;" and another, entitled "An act for the impartial administration of justice, in the cases of persons questioned for any act done by them

in the execution of the law, or for the suppression of riots and tumults, in the province of the Massachusetts-Bay, in New England;" and another statute was then made, "for making more effectual provision for the government of the province of Quebec, &c." All which statutes are impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights:

And whereas, assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, and reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his Majesty's ministers of state:

The good people of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Newcastle, Kent, and Sussex, on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, justly alarmed by these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet, and sit in general Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted. Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, DECLARE

That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:

Resolved, N. C. D. 1. That they are entitled to life, liberty, and property; and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.

Resolved, N. C. D. 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights,

liberties and immunities of free and nautral-born subjects, within the realm of England.

Resolved, N. C. D. 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

Resolved, 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects in America, without their consent.

Resolved, N. C. D. 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

Resolved, 6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

Resolved, N. C. D. 7. That these, his majesty's colonies, are likewise entitled to all the immunities and privileges

granted and confirmed to them by royal charters, or secured by their several codes of provincial laws.

Resolved, N. C. D. 8. That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

Resolved, N. C. D. 9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

Resolved, N. C. D. 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringements and violations of the foregoing rights, which, from an ardent desire, that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts and measures as have been adopted since the last war, which demonstrate a system formed to enslave America.¹

¹ Journal of Congress, vol. 1, 26-29.

Appendix No. 2.**ARTICLES OF CONFEDERATION AND
PERPETUAL UNION.**

Submitted to the Second Colonial Congress by Benjamin Franklin,
July 21, 1775.

ARTICLE I.

The Name of this Confederacy shall henceforth be
THE UNITED COLONIES OF NORTH AMERICA.

ARTICLE II.

The said United Colonies hereby severally enter into a firm League of Friendship with each other, binding on themselves and their Posterity, for their common Defence against their Enemies, for the Securities of their Liberties and Property, the Safety of their Persons and Families, and their mutual and general Welfare.

ARTICLE III.

That each Colony shall enjoy and retain as much as it may think fit of its own present Laws, Customs, Rights, Privileges and peculiar Jurisdictions within its own Limits; and may amend its own Constitution as shall seem best to its own Assembly or Convention.

ARTICLE IV.

That for the more convenient Management of general Interests, Delegates shall be annually elected in each Colony, to meet in General Congress at such Time and Place as shall be agreed on in the next preceding Congress. Only where particular Circumstances do not make a Deviation necessary, it is understood to be a Rule, that each succeeding Congress be held in a different Colony till the whole Number be gone through, and so in perpetual Rotation; and that accordingly the next Congress after the present shall be held at Annapolis, in Maryland.

ARTICLE V.

That the Power and Duty of the Congress shall extend to the Determining on War and Peace, to sending and receiving ambassadors, and entering into Alliances (the Reconciliation with Great Britain); the Settling all Disputes and Differences between Colony and Colony, about Limits or any other cause, if such should arise; and the Planting of new Colonies when proper. The Congress shall also make such general Ordinances as, though necessary to the General Welfare, particular Assemblies cannot be competent to, viz.—Those that may relate to our general Commerce, or general Currency; the Establishment of Posts; and the Regulation of our common Forces. The Congress shall also have the Appointment of all General Officers, civil and military, appertaining to the general Confederacy, such as General Treasurer, Secretary, etc.

ARTICLE VI.

All Charges of War, and all other general Expenses to be incurred for the common Welfare, shall be defrayed out of a common Treasury, which is to be supplied by each Colony in proportion to its Number of Male Polls between 16 and 60 years of age; The Taxes for paying that proportion are to be laid and levied by the Laws of each Colony.

ARTICLE VII.

The Number of Delegates to be elected and sent to Congress by each Colony shall be regulated, from time to time, by the Number of such Polls returned, so as that one Delegate be allowed for every (5,000) Polls. And the Delegates are to bring with them to every Congress an authenticated Return of the number of Polls in their respective Provinces, which is to be ^{triennially} ^{annually} taken for the Purposes above mentioned.

ARTICLE VIII.

At every Meeting of the Congress, One half of the Members returned, exclusive of Proxies, shall be necessary to make a Quorum; and Each Delegate at the Congress shall

have a Vote in all Cases; and if necessarily absent, shall be allowed to appoint any other Delegate from the same Colony to be his Proxy, who may vote for him.

ARTICLE IX.

An executive Council shall be appointed by the Congress out of their own Body, consisting of (12) Persons; of whom, in the first Appointment, one-Third, viz., (4) shall be for one Year, four for two Years, and (4) for three Years; and as the said Terms expire, the Vacancy shall be filled by Appointments for three Years; whereby One-Third of the Members will be changed annually. And each Person who has served the said Term of three Years as Counsellor, shall have a Respite of three Years, before he can be elected again. This Council, (of whom two-thirds shall be a Quorum) in the Recess of Congress, is to execute what shall have been enjoined thereby; to manage the general continental Business and Interests; to receive Applications from foreign Countries; to prepare Matters for the Consideration of the Congress; to fill up, (*Pro tempore*) continental Offices that fall vacant; and to draw on the General Treasurer for such Moneys as may be necessary for general Services, and appropriated by the Congress to such Services.

ARTICLE X.

No Colony shall engage in an offensive War with any Nation of Indians without the Consent of the Congress, or great Council above mentioned, who are first to consider the Justice and Necessity of such War.

ARTICLE XI.

A perpetual Alliance, offensive and defensive, is to be entered into as soon as may be with the Six Nations; their Limits to be ascertained and secured to them; their Land not to be encroached on, nor any private or Colony Purchases made of them hereafter to be held good; nor any Contract for Lands to be made, but between the Great Council of the Indians at Onondaga and the General Congress. The Boundaries and Lands of all the other Indians shall also be ascertained and secured to

them in the same manner, and Persons appointed to reside among them in proper Districts, who shall take care to prevent Injustice in the Trade with them, and be enabled at our general Expense, by occasional small Supplies, to relieve their personal Wants and Distresses. And all Purchases from them shall be by the Congress, for the General Advantage and Benefit of the United Colonies.

ARTICLE XII.

As all new Institutions may have Imperfections, which only Time and Experience can discover, it is agreed, That the General Congress, from time to time, shall propose such Amendments of this Constitution as may be found necessary; which being approved by a Majority of the Colony Assemblies, shall be equally binding with the rest of the Articles of this Confederation.

ARTICLE XIII.

Any and every Colony from Great Britain upon the Continent of North America, and not at present engaged in our Association, may, upon Application and joining the said Association, be received into this Confederation, viz., (Ireland), the West India Islands, Quebec, St. John's, Nova Scotia, Bermudas, and the East and West Floridas; and shall thereupon be entitled to all the Advantages of our Union, mutual Assistance and Commerce.

These Articles shall be proposed to the several Provincial Conventions or Assemblies, to be by them considered; and if approved, they are advised to empower their Delegates to agree to and ratify the same in the ensuing Congress. After which the Union thereby established is to continue firm, till the Terms of Reconciliation proposed in the Petition of the last Congress to the King are agreed to; till the Acts since made, restraining the American Commerce and Fisheries are repealed; till Reparation is made for the Injury done to Boston, by shutting up its Port; for the Burning of Charlestown; and for the Expense of this unjust War; and till all the British Troops are withdrawn from America. On the Arrival of these Events, the Colonies (shall) return to their former Connexion and Friendship with Britain, but on Failure thereof, this Confederation is to be Perpetual.

Appendix No. 3.**ARTICLES OF CONFEDERATION.**

Whereas the Delegates of the United States of America in Congress assembled did on the fifteenth day of November in the year of Our Lord One Thousand Seven Hundred and Seventy-seven, and in the Second Year of the Independence of America agree to certain articles of Confederation and perpetual Union between the States of Newhampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina, and Georgia in the Words following, viz.:

"Articles of Confederation and Perpetual Union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia."

Article I. The Style of this Confederacy shall be "The United States of America."

Article II. Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

Article III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

Article IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all

the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively; provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other State of which the owner is an inhabitant; provided, also that no imposition, duties, or restriction, shall be laid by any State, on the property of the United States, or either of them.

If any person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon the demand of the governor or executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given, in each of these States, to the records, acts, and judicial proceedings of the courts and magistrates of every other State.

Article V. For the more convenient management of the general interests of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in any meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress; and the members of Congress shall be protected

in their persons from arrests and imprisonments during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty, with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state, nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutred, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have re-

ceived certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled shall determine otherwise.

Article VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to, or surveyed for, any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall, from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several States, within the time agreed upon by the United States in Congress assembled.

Article IX. The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving

ambassadors; entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures; provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal, in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive authority or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given by order of Congress, to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall, in the presence of Congress be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges, to hear and

finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination: and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court, to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned; provided, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection or hope of reward." Provided, also, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions, as they may respect such lands, and the States which passed such grants are adjusted, the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction shall, on the petition of either party to the Congress of the United States, be finally determined, as near as may be, in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard

of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States; provided that the legislative right of any State within its own limits be not infringed or violated; establishing and regulating post-offices from one State to another throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces, in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated "a Committee of the States," and to consist of one delegate from each State; and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding; and thereupon the legislature of each State shall appoint the regimental officers, raise the men and clothe, arm, and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled: But if the United States, in Congress assembled, shall, on

consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared, and the officers and men so clothed, armed, and equipped, shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same, nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State, on any question, shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the legislatures of the several States.

Article X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall from time to time, think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States, in the Congress of the United States assembled is requisite.

Article XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to all the advantages of this Union; but no other colony shall be admitted to the same unless such admission be agreed to by nine States.

Article XII. All bills of credit emitted, monies borrowed, and debts contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

Article XIII. Every State shall abide by the determinations of the United States, in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

And whereas it has pleased the Great Governor of the world to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union, Know ye, that we the undersigned delegates, by virtue of the power and authority to us given for that purpose, do, by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained:

And we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the United States, in Congress assembled, on all questions, which by the said Confederation are submitted to them; and that the Articles thereof shall be inviolably observed by the States we respectively represent, and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania the ninth day of July in the Year of our Lord one thousand seven hundred and seventy-eight, and in the third year of the Independence of America.

On the part and behalf of the State of New Hampshire.

JOSIAH BARTLETT, JOHN WENTWORTH, Junr.
August 8th, 1778.

On the part and behalf of the State of Massachusetts-Bay.

JOHN HANCOCK. FRANCIS DANA.
SAMUEL ADAMS. JAMES LOVELL
ELBRIDGE GERRY. SAMUEL HOLTEN

On the part and behalf of the State of Rhode Island
and Providence Plantations.

WILLIAM ELLERY JOHN COLLINS
HENRY MARCHANT

On the part and behalf of the State of Connecticut.

ROGER SHERMAN TITUS HOSMER
SAMUEL HUNTINGTON ANDREW ADAMS
OLIVER WOLCOTT

On the part and behalf of the State of New York.

JAS. DUANE WM. DUER
FRA. LEWIS GOUV. MORRIS

On the part and behalf of the State of New Jersey.
Novr. 26, 1778.

JNO. WITHERSPOON. NATHL. SCUDDER.

On the part and behalf of the State of Pennsylvania.

ROBT. MORRIS WILLIAM CLINGAN
DANIEL ROBERDEAU JOSEPH REED,
JONA. BAYARD SMITH 22d July, 1778.

On the part and behalf of the State of Delaware.

THO. M'KEAN, Feby. 12, 1779. NICHOLAS VAN DYKE.
JOHN DICKINSON, May 5th, 1779.

On the part and behalf of the State of Maryland.

JOHN HANSON, March 1, 1781. DANIEL CARROLL, do.

On the part and behalf of the State of Virginia.

RICHARD HENRY LEE JNO. HARVIE
JOHN BANISTER FRANCIS LIGHTFOOT LEE.
THOMAS ADAMS

On the part and behalf of the State of North Carolina.

JOHN PENN, July 21st, 1778. JNO WILLIAMS,
CORN. HARNETT.

On the part and behalf of the State of South Carolina.

HENRY LAURENS, RICHD. HUTSON,
WILLIAM HENRY DRAYTON,
JNO. MATTHEWS, THOS. HEYWARD, Junr.

On the part and behalf of the State of Georgia.

JNO. WALTON, 24th July 1778.
EDWD. TELFAIR. EDWD. LANGWORTHY.

Appendix No. 4.

PLAN OF A CONSTITUTION

By Mr. Randolph, Governor of Virginia.

1. "Resolved, that the Articles of Confederation ought to be so corrected and enlarged as to accomplish the objects proposed by their institution; namely, common defence, security of liberty, and general welfare.

2. "Resolved, therefore, that the rights of suffrage in the National Legislature ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases.

3. "Resolved, that the National Legislature ought to consist of two branches.

4. "Resolved, that the members of the first branch of the National Legislature ought to be elected by the people of the several States every — for the term of —; to be of the age of — years at least; to receive liberal stipends by which they may be compensated for the devotion of their time to the public service; to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the first branch, during the term of service, and for the space of — after its expiration; to be incapable of re-election for the space of — after the expiration of their term of service, and to be subject to recall.

5. "Resolved, that the members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures, to be of the age of — years at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by which they may be compensated for the devotion of their time to the public service; and to be ineligible to any office established by a particular State, or under the authority of the United States, except those peculiarly belonging to the functions of the second branch, during the term

of service; and for the space of — after the expiration thereof.

6. "Resolved, that each branch ought to possess the right of originating acts; that the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation, and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaty subsisting under the authority of the Union; and to call forth the force of the Union against any member of the Union failing to fulfill its duty under the Articles thereof.

7. "Resolved, that a National Executive be instituted; to be chosen by the National Legislature for the term of —; to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase nor diminution shall be made, so as to affect the magistracy existing at the time of increase or diminution; and to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the Confederation.

8. "Resolved, that the Executive, and a convenient number of the national Judiciary, ought to compose a Council of Revision, with authority to examine every act of the National Legislature, before it shall operate, and every act of a particular Legislature before a negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the act of the National Legislature be again passed, or that of a particular Legislature be again negatived by — of the members of each branch.

9. "Resolved, that a National Judiciary be established; to consist of one or more supreme tribunals, and of inferior tribunals to be chosen by the National Legislature; to hold their offices during good behavior, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office

at the same time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the *dernier ressort*, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested; or which respect the collection of the national revenue; impeachments of any national officers, and questions which may involve the national peace and harmony.

10. "Resolved, that provision ought to be made for the admission of States lawfully arising within the limits of the United States whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

11. "Resolved, that a republican government, and the territory of each State, except in the instance of a voluntary junction of government and territory, ought to be guaranteed by the United States to each State.

12. "Resolved, that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day after the reform of the Articles of Union shall be adopted, and for the completion of all their engagements.

13. "Resolved, that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary; and that the assent of the National Legislature ought not to be required thereto.

14. "Resolved, that the legislative, executive, and judiciary powers, within the several States ought to be bound by oath to support the Articles of Union.

15. "Resolved, that the amendments which shall be offered to the Confederation, by the Convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several Legislatures, to be expressly chosen by the people to consider and decide thereon.¹

¹ Journal, 61, 64.

Appendix No. 5.**PLAN OF A CONSTITUTION.**

By Charles Pinckney.

ARTICLE I.

“The style of this government shall be, The United States of America, and the government shall consist of supreme legislative, executive and judicial powers.

ARTICLE II.

“The legislative power shall be vested in a Congress, to consist of two separate Houses; one to be called the House of Delegates; and the other the Senate, who shall meet on the — day of — in every year.

ARTICLE III.

“The members of the House of Delegates shall be chosen every — year by the people of the several States; and the qualifications of the electors shall be the same as those of the electors in the several States for their Legislatures. Each member shall have been a citizen of the United States for — years; and shall be of — years of age, and a resident in the State he is chosen for. Until a census of the people shall be taken in the manner hereinafter mentioned, the House of Delegates shall consist of —, to be chosen from the different States in the following proportions: for New Hampshire, —; for Massachusetts, —; for Rhode Island, —; for Connecticut, —; for New York, —; for New Jersey, —; for Pennsylvania, —; for Delaware, —; for Maryland, —; for Virginia, —; for North Carolina, —; for South Carolina, —; for Georgia, —; and the Legislature shall hereinafter regulate the number of Delegates by the number of inhabitants, according to the provisions hereinafter made, at the rate of one for every — thousand. All money bills of every kind shall originate in the House of Delegates, and shall not be altered by the

Senate. The House of Delegates shall exclusively possess the power of impeachment, and shall choose its own officers; and vacancies therein shall be supplied by the executive authority of the State in the representation from which they shall happen.

ARTICLE IV.

“The Senate shall be elected and chosen by the House of Delegates; which House, immediately after their meeting, shall choose by ballot — Senators from among the citizens and residents of New Hampshire; — from among those of Massachusetts; — from among those of Rhode Island; — from among those of Connecticut; — from among those of New York; — from among those of New Jersey; — from among those of Pennsylvania; — from among those of Delaware; — from among those of Maryland; — from among those of Virginia; — from among those of North Carolina; — from among those of South Carolina; and — from among those of Georgia. The senators chosen from New Hampshire, Massachusetts, Rhode Island, and Connecticut shall form one class; those from New York, New Jersey, Pennsylvania, and Delaware, one class; and those from Maryland, Virginia, North Carolina, South Carolina, and Georgia, one class. The House of Delegates shall number these classes one, two and three; and fix the times of their service by lot. The first class shall serve for — years; the second for — years; and the third for — years. As their times of service expire, the House of Delegates shall fill them up by elections for — years; and they shall fill all vacancies that arise from death or resignation, for the time of service remaining of the members so dying or resigning. Each Senator shall be — years of age at least; and shall have been a citizen of the United States for four years before his election; and shall be a resident of the State he is chosen from. The Senate shall choose its own officers.

ARTICLE V.

“Each State shall prescribe the time and manner of holding elections by the people for the House of Delegates; and

the House of Delegates shall be the judges of the elections, returns, and qualifications of their members.

“In each House a majority shall constitute a quorum to do business. Freedom of speech and debate in the Legislature shall not be impeached, or questioned, in any place out of it; and the members of both Houses shall in all cases, except for treason, felony or breach of the peace, be free from arrest during their attendance on Congress, and in going to and returning from it. Both Houses shall keep Journals of their proceedings, and publish them, except on secret occasions; and the Yeas and Nays may be entered thereon at the desire of one — of the members present. Neither House, without the consent of the other, shall adjourn for more than — days, nor to any place but where they are sitting.

“The members of each House shall not be eligible to, or capable of holding, any office under the Union, during the time for which they have been respectively elected; nor the members of the Senate for one year after. The members of each House shall be paid for their services by the States which they represent. Every bill which shall have passed the Legislature shall be presented to the President of the United States for his revision; if he approves it, he shall sign it; but if he does not approve it, he shall return it, with his objections, to the House it originated in; which House, if two-thirds of the members present, notwithstanding the President’s objections, agree to pass it, shall send it to the other House, with the President’s objections; where if two-thirds of the members present also agree to pass it, the same shall become a law; and all bills sent to the President, and not returned by him within — days, shall be laws, unless the Legislature, by their adjournment, prevent their return; in which case they shall not be laws.

ARTICLE VI.

“The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises;

To regulate commerce with all nations, and among the several States;

To borrow money and emit bills of credit;

- To establish post-offices;
- To raise armies;
- To build and equip fleets;
- To pass laws for arming, organizing, and disciplining the militia of the United States;
- To subdue a rebellion in any State, on application of its Legislature;
- To coin money, and regulate the value of all coins, and fix the standard of weights and measures;
- To provide such dockyards and arsenals, and erect such fortifications as may be necessary for the United States, and to exercise exclusive jurisdiction therein;
- To appoint a Treasurer by ballot;
- To constitute tribunals inferior to the Supreme Court;
- To establish posts and military roads;
- To establish and provide for a national university at the seat of the government of the United States;
- To establish uniform rules of naturalization;
- To provide for the establishment of a seat of government for the United States, not exceeding — miles square, in which they shall have exclusive jurisdiction;
- To make rules concerning captures from an enemy;
- To declare the law and punishment of piracies and felonies at sea, and of counterfeiting coin, and of all offences against the laws of nations;
- To call forth the aid of the militia to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;
- And make all laws for carrying the foregoing powers into execution.

The Legislature of the United States shall have the power to declare the punishment of treason, which shall consist only in levying war against the United States, or any of them, or in adhering to their enemies. No person shall be convicted of treason but by the testimony of two witnesses.

The proportion of direct taxation shall be regulated by the whole number of inhabitants of every description; which number shall, within — years after the first meeting of the Legislature, and within the term of every — year after, be taken in the manner to be prescribed by the Legislature.

No tax shall be laid on articles exported from the States; nor capitation tax, but in proportion to the census before directed.

All laws regulating commerce shall require the assent of two-thirds of the members present in each House. The United States shall not grant any title of nobility. The Legislature of the United States shall pass no law on the subject of religion; nor touching or abridging the liberty of the press; nor shall the privilege of the writ of Habeas Corpus ever be suspended, except in case of rebellion or invasion.

All acts made by the Legislature of the United States, pursuant to this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the land; and all judges shall be bound to consider them as such in their decisions.

ARTICLE VII.

“The Senate shall have the sole and exclusive power to declare war; and to make treaties; and to appoint ambassadors and other ministers to foreign nations, and judges of the Supreme Court.

They shall have the exclusive power to regulate the manner of deciding all disputes and controversies now existing, or which may arise, between the States, respecting jurisdiction or territory.

ARTICLE VIII.

“The executive power of the United States shall be vested in a President of the United States of America, which shall be his style; and his title shall be His Excellency. He shall be elected for — years; and shall be re-eligible.

He shall from time to time give information to the Legislature, of the State of the Union, and recommend to their consideration the measures he may think necessary. He shall take care that the laws of the United States be duly executed. He shall commission all the officers of the United States; and, except as to ambassadors, other ministers, and judges of the Supreme Court, he shall nominate, and, with the consent of the Senate, appoint, all

other officers of the United States. He shall receive public ministers from foreign nations; and may correspond with the Executives of the different States. He shall have power to grant pardons and reprieves, except in impeachments. He shall be Commander-in-Chief of the army and navy of the United States, and of the militia of the several States; and shall receive a compensation which shall not be increased or diminished during his continuance in office. At entering on the duties of his office, he shall take an oath faithfully to execute the duties of a President of the United States. He shall be removed from his office on impeachment by the House of Delegates, and conviction in the Supreme Court, of treason, bribery, or corruption. In case of his removal, death, resignation, or disability, the President of the Senate shall exercise the duties of his office until another President be chosen. And in case of the death of the President of the Senate, the Speaker of the House of Delegates shall do so.

ARTICLE IX.

“The Legislature of the United States shall have the power, and it shall be their duty, to establish such courts of law, equity, and admiralty, as shall be necessary.

“The judges of the courts shall hold their offices during good behavior; and receive a compensation, which shall not be increased or diminished during their continuance in office. One of these Courts shall be termed the Supreme Court; whose jurisdiction shall extend to all cases arising under the laws of the United States, or affecting ambassadors, other public ministers and consuls; to the trial of impeachment of officers of the United States; to all cases of admiralty and maritime jurisdiction. In cases of impeachment affecting ambassadors, and other public ministers, this jurisdiction shall be original, and in all other cases appellate.

“All criminal offences, except in cases of impeachment, shall be tried in the State where they shall be committed. The trials shall be open and public, and shall be by jury.

ARTICLE X.

“Immediately after the first census of the people of the United States, the House of Delegates shall apportion

the Senate by electing for each State, out of the citizens resident therein, one Senator for every — members each State shall have in the House of Delegates. Each State shall be entitled to have at least one member in the Senate.

ARTICLE XI.

“No State shall grant letters of marque and reprisal, or enter into treaty, or alliance, or confederation; nor grant any title of nobility; nor, without the consent of the Legislature of the United States, lay any impost on imports; nor keep troops or ships of war in time of peace; nor enter into compacts with other States or foreign powers; nor emit bills of credit; nor make anything but gold, silver, or copper, a tender in payment of debts; nor engage in war, except for self-defense when actually invaded, or the danger of invasion be so great as not to admit of a delay until the Government of the United States can be informed thereof. And to render these prohibitions effectual, the Legislature of the United States shall have the power to revise the laws of the several States that may be supposed to infringe the powers exclusively delegated by this Constitution to Congress, and to negative and annul such as do.

ARTICLE XII.

“The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States. Any person charged with crimes in any State, fleeing from justice to another, shall, on demand of the Executive of the State from which he fled, be delivered up, and removed to the State having jurisdiction of the offence.

ARTICLE XIII.

“Full faith shall be given in each State, to the acts of the Legislature, and to the records and judicial proceedings of the courts and magistrates, of every State.

ARTICLE XIV.

“The Legislature shall have the power to admit new States into the Union, on the same terms with the original

States; provided two-thirds of the members present in both Houses agree.

ARTICLE XV.

“On the application of the Legislature of a State, the United States shall protect it against domestic insurrection.

ARTICLE XVI.

“If two-thirds of the Legislatures of the States apply for the same, the Legislature of the United States shall call a convention for the purpose of amending the Constitution; or, should Congress, with the consent of two-thirds of each House, propose to the States amendments to the same, the agreement of two-thirds of the Legislatures of the States shall be sufficient to make the said amendments parts of the Constitution.

The ratification of the ——— conventions of ——— States shall be sufficient for organizing this Constitution.¹

Appendix No. 6.

PLAN OF A CONSTITUTION.

By William Paterson.

1. Resolved, that the Articles of Confederation ought to be so revised, corrected, and enlarged, as to render the Federal Constitution adequate to the exigencies of government, and the preservation of the Union.

2. Resolved, that, in addition to the powers vested in the United States in Congress, by the present existing Articles of Confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods or merchandises of foreign growth or manufacture, imported into any part of the United States; by stamps on paper, vellum, or parchment; and by postage on all letters or packages passing through the general

¹ Journal, 64, 72.

post-office; to be applied to such Federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same, from time to time, to alter and amend in such manner as they shall think proper; to pass acts for the regulation of trade and commerce, as well with foreign nations as with each other; provided that all punishments, fines, forfeitures and penalties, to be incurred for contravening such acts, rules and regulations, shall be adjudged by the common law Judiciaries of the State in which any offence contrary to the true intent and meaning of such acts, rules, and regulations, shall have been committed or perpetrated, with liberty of commencing in the first instance all suits and prosecutions for that purpose in the Superior common law Judiciary in such State; subject, nevertheless, for the correction of all errors, both in law and fact, in rendering judgment, to an appeal to the Judiciary of the United States.

3. Resolved, that whenever requisitions shall be necessary, instead of the rule for making requisitions mentioned in the Articles of Confederation, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex, and condition, including those bound to servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that, if such requisitions be not complied with, in the time specified therein, to direct the collection thereof in the non-complying States; and for that purpose to devise and pass acts directing and authorizing the same; provided, that none of the powers hereby vested in the United States in Congress, shall be exercised without the consent of at least — States; and in that proportion, if the number of confederated States should hereafter be increased or diminished.

4. Resolved, that the United States in Congress be authorized to elect a Federal Executive; to consist of — persons, to continue in office for the term of — years; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons composing

the Executive at the time of such increase or diminution; to be paid out of the Federal treasury; to be incapable of holding any other office or appointment during their time of service, and for — years thereafter: to be ineligible a second time, and removable by Congress, on application by a majority of the Executives of the several States; that the Executive, besides their general authority to execute the Federal acts, ought to appoint all Federal officers not otherwise provided for, and to direct all military operations; provided, that none of the persons composing the Federal Executive shall, on any occasion, take command of any troops, so as personally to conduct any military enterprise, as General, or in any other capacity.

5. Resolved, that a Federal Judiciary be established, to consist of a supreme tribunal, the Judges of which to be appointed by the Executive, and to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no increase nor diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the Judiciary so established shall have authority to hear and determine, in the first instance, on all impeachments of Federal officers; and, by way of appeal in the *dernier resort*, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested; in the construction of any treaty or treaties, or which may arise on any of the acts for the regulation of trade, or the collection of the Federal revenue; that none of the Judiciary shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for — thereafter.

6. Resolved, that all acts of the United States in Congress made by virtue and in pursuance of the powers hereby, and by the Articles of Confederation, vested in them, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, so far forth as those acts or treaties shall relate to the said States or their citizens; and that the Judiciary of the several States shall be bound there-

by in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding: and that if any State, or any body of men in any State, shall oppose or prevent the carrying into execution such acts or treaties, the Federal Executive shall be authorized to call forth the power of the Confederate States, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

7. Resolved, that provision be made for the admission of new States into the Union.

8. Resolved, that the rule for naturalization ought to be the same in every State.

9. Resolved, that a citizen of one State committing an offence in another State of the Union, shall be deemed guilty of the same offence as if it had been committed by a citizen of the State in which the offence was committed.¹

Appendix No. 7.

PLAN OF A CONSTITUTION.

Submitted by Alexander Hamilton to the Convention of 1787 near its close.

The people of the United States of America do ordain and establish this Constitution for the government of themselves and their posterity.

ARTICLE I.

Sec. 1. The legislative power shall be vested in two distinct bodies of men, one to be called the Assembly, the other the Senate, subject to the negative hereinafter mentioned.

Sec. 2. The executive power, with the qualifications hereinafter specified, shall be vested in a President of the United States.

Sec. 3. The supreme judicial authority, except in cases otherwise provided for in this Constitution, shall be vested in a court, to be called the Supreme Court, to consist of not less than six, nor more than twelve judges.

¹ Journal, 164, 167.

ARTICLE II.

Sec. 1. The Assembly shall consist of persons to be called Representatives, who shall be chosen, except in the first instance, by the free male citizens and inhabitants of the several States comprehended in the Union, all of whom, of the age of twenty-one years and upwards, shall be entitled to an equal vote.

Sec. 2. But the first Assembly shall be chosen in the manner prescribed in the last Article, and shall consist of one hundred members, of whom New Hampshire shall have five, Massachusetts thirteen, Rhode Island two, Connecticut seven, New York nine, New Jersey six, Pennsylvania twelve, Delaware two, Maryland eight, Virginia sixteen, North Carolina eight, South Carolina eight, Georgia four.

Sec. 3. The Legislature shall provide for the future elections of representatives apportioning them in each State, from time to time, as nearly as may be to the number of persons described in the 4th Section of the 7th Article, so as that the whole number of representatives shall never be less than one hundred, nor more than — hundred. There shall be a census taken for this purpose within three years after the first meeting of the Legislature, and within every successive period of ten years. The term for which representatives shall be elected shall be determined by the Legislature, but shall not exceed three years. There shall be a general election at least once in three years, and the time of service of all the members in each Assembly shall begin (except in filling vacancies) on the same day, and shall always end on the same day.

Sec. 4. Forty members shall make a house sufficient to proceed to business; but this number may be increased by the Legislature, yet so as never to exceed a majority of the whole number of representatives.

Sec. 5. The Assembly shall choose its President and other officers, shall judge of the qualifications and elections of its own members, shall punish them for improper conduct in their capacity of representatives, not extending to life or limb, and shall exclusively possess the power of impeachment, except in the case of the President of the United States; but no impeachment of a member of

the Senate shall be by less than two-thirds of the representatives present.

Sec. 6. Representatives may vote by proxy, but no representative shall be proxy for more than one who is absent.

Sec. 7. Bills for raising revenue, and bills for appropriating moneys for the support of fleets and armies, and for paying the salaries of the officers of government, shall originate in the Assembly, but may be altered and amended by the Senate.

Sec. 8. The acceptance of an office under the United States by a representative, shall vacate his seat in the Assembly.

ARTICLE III.

Sec. 1. The Senate shall consist of persons to be chosen, except in the first instance, by electors elected for that purpose by the citizens and inhabitants of the several States comprehended in the Union, who shall have in their own right, or in the right of their wives, an estate in land for not less than life, or a term of years, whereof at the time of giving their votes there shall be at least fourteen years unexpired.

Sec. 2. But the full Senate shall be chosen in the manner prescribed in the last Article, and shall consist of forty members, to be called Senators, of whom New Hampshire shall have —, Massachusetts —, Rhode Island —, Connecticut —, New York —, New Jersey —, Pennsylvania —, Delaware —, Maryland —, Virginia —, North Carolina —, South Carolina —, Georgia —.

Sec. 3. The Legislature shall provide for the future elections of Senators; for which purpose the States respectively, which have more than one Senator, shall be divided into convenient districts to which the Senators shall be apportioned. A State having but one Senator shall be itself a district. On the death, resignation, or removal from office of a Senator, his place shall be supplied by a new election in the district from which he came. Upon each election there shall not be less than six nor more than twelve electors chosen in a district.

Sec. 4. The number of Senators shall never be less

than forty, nor shall any State, if the same shall not hereafter be divided, ever have less than the number allotted to it in the second Section of this Article; but the Legislature may increase the whole number of Senators, in the same proportion to the whole number of representatives as forty is to one hundred, and such increase beyond the present number, shall be apportioned to the respective States in a ratio to the respective numbers of their representatives.

Sec. 5. If States shall be divided, or if a new arrangement of the boundaries of two or more States shall take place, the Legislature shall apportion the number of Senators (in elections succeeding such division or arrangement) to which the constituent parts were entitled according to the change of situation, having regard to the number of persons described in the 4th Section of the 7th Article.

Sec. 6. The Senators shall hold their places, during good behavior, removable only by conviction, on impeachment for some crime or misdemeanor. They shall continue to exercise their offices when impeached, until a conviction shall take place. Sixteen Senators attending in person, shall be sufficient to make a house to transact business; but the Legislature may increase this number, yet so as never to exceed a majority of the whole number of Senators. The Senators may vote by proxy, but no Senator who is present shall be proxy for more than two who are absent.

Sec. 7. The Senate shall choose its President and other officers; shall judge of the qualifications and elections of its members; and shall punish them for improper conduct in their capacity of Senators; but such punishment shall not extend to life or limb, nor to expulsion. In the absence of their President they may choose a temporary President. The President shall only have a casting vote when the House is equally divided.

Sec. 8. The Senate shall exclusively possess the power of declaring war. No treaty shall be made without their advice and consent; which shall also be necessary to the appointment of all officers, except such for which a different provision is made in this Constitution.

ARTICLE IV.

Sec. 1. The President of the United States of America (except in the first instance) shall be elected in the manner following:

The judges of the Supreme Court shall, within sixty days after a vacancy shall happen, cause public notice to be given in each State of such vacancy, appointing therein three several days, for the several purposes following, to wit—a day for commencing the election of electors for the purposes hereinafter specified, to be called the first electors, which day shall be not less than forty nor more than sixty days after the day of the publication of the notice in each State; another day for the meeting of electors, not less than forty nor more than ninety days from the day for commencing their election. Another day for the meeting of electors, to be chosen by the first electors, for the purpose hereinafter specified, and to be called the second electors, which day shall be not less than forty nor more than sixty days after the day for the meeting of the first electors.

Sec. 2. After notice of a vacancy shall have been given, there shall be chosen in each State a number of persons, as the first electors in the preceding section mentioned, equal to the whole number of the representatives and Senators of such State, in the Legislature of the United States; which electors shall be chosen by the citizens of such State, having an estate of inheritance or for three lives in land, or a clear personal estate of the value of one thousand Spanish milled dollars of the present standard.

Sec. 3. These first electors shall meet in their respective States at the time appointed, at one place, and shall proceed to vote by ballot for a President, who shall not be one of their own number, unless the Legislature, upon experiment, should hereafter direct otherwise. They shall cause two lists to be made of the name or names of the person or persons voted for, which they or the major part of them, shall sign and certify. They shall then proceed each to nominate individually, openly, in the presence of the others, two persons, as for second electors, and out of the persons who shall have the four highest numbers of nominations; they shall afterwards, by ballot,

by plurality of votes, choose two who shall be the second electors, to each of whom shall be delivered one of the lists, before-mentioned. These second electors shall not be any of the persons voted for as President. A copy of the same list, signed and certified in like manner, shall be transmitted by the first electors, to the seat of the government of the United States, under a sealed cover, directed to the President of the Assembly, which, after the meeting of the second electors shall be opened, for the inspection of the two houses of the Legislature.

Sec. 4. These second electors shall meet precisely on the day appointed, and not on another day, at one place. The chief justice of the Supreme Court, or if there be no chief justice, the judge junior in office, in such court, or if there be no one judge junior in office, some other judge of that court, by the choice of the rest of the judges, or of a majority of them, shall attend at the same place, and shall preside at the meeting, but shall have no vote. Two-thirds of the whole number of the electors shall constitute a sufficient meeting for the execution of their trust. At this meeting the lists delivered to the respective electors, shall be produced and inspected, and if there be any person who has a majority of the whole number of the votes given by the first electors, he shall be the President of the United States; but if there be no such person, the second electors so met shall proceed to vote by ballot, for one of the *persons*, named in the lists, *who* shall have the three highest numbers of the votes of the first electors; and if upon the first, or any succeeding ballot, on the day of the meeting, either of those persons shall have a number of votes, equal to a majority of the whole number of second electors chosen, he shall be the president. But if no such choice be made, on the day appointed for the meeting, either by reason of the non-attendance of the second electors, or their not agreeing, or any other matter, the person having the greatest number of votes of the first electors shall be the President.

Sec. 5. If it should happen that the chief justice or some other judge of the Supreme Court should not attend in due time, the second electors shall proceed to the execution of their trust without him.

Sec. 6. If the judges should neglect to cause the notice

required by the first section of this article to be given within the time therein limited, they may, nevertheless, cause it to be afterwards given; but their neglect, if wilful, is hereby declared to be an offence, for which they may be impeached, and if convicted, they shall be punished as in other cases of conviction on impeachment.

Sec. 7. The Legislature shall, by permanent laws, provide such further regulations as may be necessary for the more orderly election of the President, not contravening the provisions herein contained.

Sec. 8. The President, before he shall enter upon the execution of his office, shall take an oath or affirmation, faithfully to execute the same, and to the utmost of his judgment and power to protect the rights of the people, and preserve the Constitution inviolate. This oath or affirmation shall be administered by the President of the Senate, for the time being, in the presence of both houses of the Legislature.

Sec. 9. The Senate and the Assembly shall always convene in session on the day appointed for the meeting of the second electors, and shall continue sitting till the President take the oath or affirmation of office. He shall hold his office during good behavior, removable only by conviction upon an impeachment for some crime or misdemeanor.

Sec. 10. The President, at the beginning of every meeting of the Legislature, as soon as they shall be ready to proceed to business, shall convene them together at the place where the Senate shall sit, and shall communicate to them all such matters as may be necessary for their information, or as may require their consideration. He may, by message, during the session, communicate all other matters which may appear to him proper. He may, whenever in his opinion the public business shall require it, convene the Senate and Assembly, or either of them, and may prorogue them for a time, not exceeding forty days at one prorogation; and if they should disagree about their adjournment, he may adjourn them to such time as he shall think proper. He shall have a right to negative all bills, resolutions, or acts of the two Houses of the Legislature, about to be passed into laws. He shall take care that the laws be faithfully executed. He

shall be the Commander-in-Chief of the army and navy of the United States and of the militia within the several States, and shall have the direction of war, when commenced; but he shall not take the actual command in the field of an army, without the consent of the Senate and Assembly. ~~All~~ treaties, conventions, and agreements with foreign nations, shall be made by him, by and with the advice and consent of the Senate. ~~He~~ shall have the appointment of the principal or chief officer of each of the departments of war, naval affairs, finances, and foreign affairs; and shall have the nomination, and by and with the consent of the Senate, the appointment of all other officers to be appointed under the authority of the United States, except such for whom different provision is made by this Constitution; and provided, that this shall not be construed to prevent the Legislature from appointing, by name, in their laws, persons to special and particular trusts, created in such laws; nor shall be construed to prevent principals in office, merely ministerial, from constituting deputies. In the recess of the Senate he may fill vacancies in offices, by appointments, to continue in force until the end of the next session of the Senate; and he shall commission all officers. He shall have power to pardon all offenses except treason, for which he may grant reprieves, until the opinion of the Senate and Assembly can be had, and with their concurrence, may pardon the same.

Sec. 11. He shall receive a fixed compensation for his services, to be paid to him at stated times, and not to be increased or diminished during his continuance in office.

Sec. 12. If he depart out of the United States without the consent of the Senate and Assembly, he shall thereby abdicate his office.

Sec. 13. He may be impeached for any crime or misdemeanor by the two Houses of the Legislature, two-thirds of each House concurring; and if convicted, shall be removed from office. He may be afterwards tried and punished in the ordinary course of law. His impeachment shall operate as a suspension from office until the determination thereof.

Sec. 14. The President of the Senate shall be Vice-

President of the United States. On the death, resignation, impeachment, removal from office, or absence from the United States, of the President thereof, the Vice-President shall exercise all the powers by this Constitution vested in the President, until another shall be appointed, or until he shall return within the United States, if his absence was with the consent of the Senate and Assembly.

ARTICLE V.

Sec. 1. There shall be a Chief Justice of the Supreme Court, and, together with the other Judges thereof, shall hold their offices during good behavior, removable only by conviction on impeachment for some crime or misdemeanor. Each Judge shall have a competent salary, to be paid to him at stated times, and not to be diminished during his continuance in office.

The Supreme Court shall have original jurisdiction in all causes, in which the United States shall be a party; in all controversies between the United States and a particular State, or between two or more States, except such as relate to a claim of territory between the United States and one or more States, which shall be determined in the mode prescribed in the Sixth Article; in all cases affecting foreign ministers, consuls, and agents; and an appellate jurisdiction, both as to law and fact, in all cases which shall concern the citizens of foreign nations, in all questions between the citizens of different States, and in all others in which the fundamental rights of this Constitution are involved, subject to such exceptions as are herein contained, and to such regulations as the Legislature shall provide.

The Judges of all Courts which may be constituted by the Legislature, shall also hold their places during good behavior, removable only by conviction on impeachment for some crime or misdemeanor; and shall have competent salaries, to be paid at stated times, and not be diminished during their continuance in office; but nothing herein contained shall be construed to prevent the Legislature from abolishing such Courts themselves.

All crimes, except upon impeachment, shall be tried by a jury of twelve men; and if they shall have been

committed within any State, shall be tried within such State. And all civil causes arising under this Constitution of the like kind with those which have been heretofore triable by jury in the respective States, shall in like manner be tried by jury, unless in special cases the Legislature shall think proper to make different provision, to which provision the concurrence of two-thirds of both houses shall be necessary.

Impeachments of the President and Vice-President of the U. S., members of the Senate, the Governors and Presidents of the several States, the principal or chief officers of the departments enumerated in the Tenth Section of the Fourth Article, ambassadors, and other like public ministers, the judges of the Supreme Court, generals and admirals of the navy, shall be tried by a Court to consist of the Judges of the Supreme Court, and the Chief Justice, or First or Senior Judge of the Superior Court of Law in each State, of whom twelve shall constitute a Court. A majority of the Judges present may convict. All other persons shall be tried on impeachment, by a Court to consist of the Judges of the Supreme Court, and six Senators drawn by lot; a majority of whom may convict. Impeachments shall clearly specify the particular offense for which the party accused is to be tried; and judgment on conviction upon the trial thereof, shall be either a removal from office singly, or removal from office and disqualification for holding any future office or place of trust. But no judgment on impeachment shall prevent prosecution and punishment in the ordinary course of law, provided that no judge, concerned in such conviction, shall sit as judge on the second trial. The Legislature may remove the disabilities incurred by conviction on impeachment.

ARTICLE VI.

Controversies about the right of territory between the United States and particular States, shall be determined by a court to be constituted in manner following. The State or States claiming in opposition to the United States, as parties, shall nominate a number of persons equal to double the number of the Judges of the Supreme Court, for the time being, of whom none shall be citizens

by birth of the States which are parties, nor inhabitants thereof, when nominated, and of whom not more than two shall have their actual residence in one State. Out of the persons so nominated, the Senate shall elect one-half, who, together with the Judges of the Supreme Court, shall form the court. Two-thirds of the whole number may hear and determine the controversy by plurality of voices. The States concerned, may, at their option, claim a decision by the Supreme Court only. All the members of the court hereby instituted shall, prior to the hearing of the cause, take an oath impartially, and according to the best of their judgments and consciences, to hear and determine the controversy.

ARTICLE VII.

Sec. 1. The Legislature of the United States shall have power to pass all laws which they shall judge necessary to the common defense and safety, and to the general welfare of the Union. But no bill, resolution, or act of the Senate and Assembly, shall have the force of a law until it shall have received the assent of the President, or of the Vice-President when exercising the powers of the President; and if such assent shall not have been given within ten days after such bill, resolution, or other act shall have been presented for that purpose, the same shall not be a law. No bill, resolution, or other act, not assented to, shall be revived in the same session of the Legislature. The mode of signifying such assent shall be by signing the bill, act, or resolution, and returning it so signed to either house of the Legislature.

Sec. 2. The enacting style of all laws shall be: "Be it enacted by the People of the United States of America."

Sec. 3. No bill of attainder shall be passed, nor any *ex post facto* law; nor shall any title of nobility be granted by the United States or by either of them; nor shall any person holding an office or place of trust under the United States, without the permission of the Legislature accept any present, emolument, office, or title from a foreign prince or state. Nor shall any religious sect, or denomination, or religious test for any office or place, be ever established by law.

Sec. 4. Taxes on lands, houses, and other real estate, and capitation taxes, shall be proportioned in each State by the whole number of free persons, except Indians not taxed, and by three-fifths of all other persons.

Sec. 5. The two houses of the Legislature may by joint ballot appoint a Treasurer of the United States. Neither house (in the session of both houses) without the consent of the other shall adjourn for more than three days at a time. The Senators and Representatives in attending, going to and coming from the session of their respective houses, shall be privileged from arrest except for crimes and breaches of the peace. The place of meeting shall always be at the seat of Government which shall be fixed by law.

Sec. 6. The laws of the United States and the treaties which have been made under the articles of the Confederation, and which shall be made under this Constitution, shall be the supreme law of the land, and shall be so construed by the Courts of the several States.

Sec. 7. The Legislature shall convene at least once in each year, which, unless otherwise provided for by law, shall be the first Monday in December.

Sec. 8. The members of the two houses of the Legislature shall receive a reasonable compensation for their services, to be paid out of the treasury of the United States, and ascertained by law. The law for making such provision shall be passed, with the concurrence of the first Assembly, and shall extend to succeeding Assemblies; and no succeeding Assembly shall concur in an alteration of such provision so as to increase its own compensation; but there shall be always a law in existence for making such provision.

ARTICLE VIII.

Sec. 1. The Governor or President of each State shall be appointed under the authority of the United States, and shall have a right to negative all laws about to be passed in the State of which he shall be Governor or President, subject to such qualifications and regulations as the Legislature of the United States shall prescribe. He shall in other respects have the same powers only which the Constitution of the State does or shall allow its

Governor or President, except as to the appointment of officers of the militia.

Sec. 2. Each Governor or President of a State shall hold his office until a successor be actually appointed, unless he die or resign or be removed from office by conviction on impeachment. There shall be no appointment of such Governor or President in the recess of the Senate.

The Governors and Presidents of the several States at the time of the ratification of this Constitution, shall continue in office in the same manner and with the same powers as if they had been appointed pursuant to the first section of this article.

The officers of the Militia in the several States may be appointed under the authority of the United States; the Legislature whereof may authorize the Governors or Presidents of States to make such appointments, with such restrictions as they shall think proper.

ARTICLE IX.

Sec. 1. No person shall be eligible to the office of President of the United States unless he be now a citizen of one of the States, or hereafter be born a citizen of the United States.

Sec. 2. No person shall be eligible as a Senator or Representative unless at the time of his election he be a citizen and inhabitant of the State in which he is chosen; provided that he shall not be deemed to be disqualified by a temporary absence from the State.

Sec. 3. No person entitled by this Constitution to elect or to be elected President of the United States, or a Senator or Representative in the Legislature thereof, shall be disqualified, but by the conviction of some offense for which the law shall have previously ordained the punishment of disqualification. But the Legislature may by law provide that persons holding offices under the United States, or either of them, shall not be eligible to a place in the Assembly or Senate, and shall be, during their continuance in office, suspended from sitting in the Senate.

Sec. 4. No person having an office or place of trust under the United States shall, without permission of the

Legislature, accept any present, emolument, office, or title from any foreign prince or state.

Sec. 5. The citizens of each State shall be entitled to the rights, privileges, and immunities of citizens in every other State; and full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of another.

Sec. 6. Fugitives from justice from one State who shall be found in another, shall be delivered up on application of the State from which they fled.

Sec. 7. No new State shall be erected within the limits of another, or by the junction of two or more, without the concurrent consent of the Legislature of the United States and of the States concerned. The Legislature of the United States may admit new States into the Union.

Sec. 8. The United States are hereby declared to be bound to guarantee to each State a republican form of Government, and to protect each State as well against domestic violence as foreign invasion.

Sec. 9. All treaties, contracts, and engagements of the United States of America, under the Articles of Confederation and perpetual Union, shall have equal validity under this Constitution.

Sec. 10. No State shall enter into a treaty, alliance, or contract, with another, or with a foreign power, without the consent of the United States.

Sec. 11. The members of the Legislature of the United States, and of each State, and all officers, executive and judicial, of the one and of the other, shall take an oath or affirmation to support the Constitution of the United States.

Sec. 12. This Constitution may receive such alterations and amendments as may be proposed by the Legislature of the United States, with the concurrence of two-thirds of the members of both houses, and ratified by the legislatures of, or by conventions of deputies chosen by the people in, two-thirds of the States composing the Union.

ARTICLE X.

This Constitution shall be submitted to the consideration of Conventions in the several States, the members

whereof shall be chosen by the people of such States respectively under the direction of their respective legislatures. Each Convention which shall ratify the same, shall appoint the first Representatives and Senators from such State according to the rule prescribed in the — section of the — article. The Representatives so appointed shall continue in office for one year only. Each Convention so ratifying shall give notice thereof to the Congress of the United States, transmitting at the same time a list of the Representatives and Senators chosen. When the Constitution shall have been duly ratified, Congress shall give notice of a day and place for the meeting of the Senators and Representatives from the several States; and when these, or a majority of them, shall have assembled, according to such notice, they shall by joint ballot, by plurality of votes, elect a President of the United States; and the Constitution thus organized shall be carried into effect.¹

Appendix No. 8.

SPEECH MADE BY MR. HAMILTON

When submitting his plan of a Constitution.

Mr. Hamilton had been hitherto silent on the business before the Convention, partly from respect to others whose superior abilities, age and experience, rendered him unwilling to bring forward ideas dissimilar to theirs; and partly from his delicate situation with respect to his own State, to whose sentiments as expressed by his colleagues, he could by no means accede. The crisis, however, which now marked our affairs, was too serious to permit any scruples whatever to prevail over the duty imposed on every man to contribute his efforts for the public safety and happiness. He was obliged, therefore, to declare himself unfriendly to both plans. He was particularly opposed to that from New Jersey, being fully convinced, that no amendment of the Confederation, leaving the States in possession of their sovereignty, could pos-

¹ Works of Hamilton, vol. 2, 395-409.

sibly answer the purpose. On the other hand, he confessed he was much discouraged by the amazing extent of country, in expecting the desired blessings from any general sovereignty that could be substituted. As to the powers of the Convention, he thought the doubts started on that subject had arisen from distinctions and reasonings too subtle. A *federal* government he conceived to mean an association of independent communities into one. Different confederacies have different powers, and exercise them in different ways. In some instances, the powers are exercised over collective bodies, in others, over individuals, as in the German Diet; and among ourselves in cases of piracy. Great latitude, therefore, must be given to the signification of the term. The plan last proposed departs, itself, from the *federal* idea, as understood by some, since it is to operate eventually on individuals. He agreed, moreover, with the honorable gentleman from Virginia (Mr. Randolph), that we owed it to our country, to do, on this emergency, whatever we should deem essential to its happiness. The States sent us here to provide for the exigencies of the Union. To rely on and propose any plan not adequate to these exigencies, merely because it was not clearly within our powers, would be to sacrifice the means to the end. It may be said that the *States* cannot *ratify* a plan not within the purview of the Article of the Confederation providing for alterations and amendments. But may not the States themselves, in which no constitutional authority equal to this purpose exists in the Legislatures, have had in view a reference to the people at large? In the Senate of New York, a proviso was moved, that no act of the Convention should be binding until it should be referred to the people and ratified; and the motion was lost by a single voice only, the reason assigned against it being, that it might possibly be found an inconvenient shackle.

The great question is, what provision shall we make for the happiness of our country? He would first make a comparative examination of the two plans—prove that there were essential defects in both—and point out such changes as might render a *national one* efficacious. The great and essential principles necessary for the support of government are:

1. An active and constant interest in supporting it. This principle does not exist in the States, in favor of the Federal Government. They have evidently in a high degree, the *esprit de corps*. They constantly pursue internal interests adverse to those of the whole. They have their particular debts, their particular plans of finance, etc. All these, when opposed to, invariably prevail over, the requisitions and plans of Congress.

2. The love of power. Men love power. The same remarks are applicable to this principle. The States have constantly shown a disposition rather to regain the powers delegated by them, than to part with more, or to give effect to what they had parted with. The ambition of their demagogues is known to hate the control of the General Government. It may be remarked, too, that the citizens have not that anxiety to prevent a dissolution of the General Government, as of the particular governments. A dissolution of the latter would be fatal; of the former, would still leave the purposes of government attainable to a considerable degree. Consider what such a State as Virginia will be in a few years, a few compared with the life of nations. How strongly will it feel its importance and self-sufficiency!

3. An habitual attachment of the people. The whole force of this tie is on the side of the State Government. Its sovereignty is immediately before the eyes of the people; its protection is immediately enjoyed by them. From its hand distributive justice, and all those acts which familiarize and endear a government to a people, are dispensed to them.

4. *Force*, by which may be understood a *coercion of laws* or *coercion of arms*. Congress have not the former, except in few cases. In particular States, this coercion is nearly sufficient; though he held it, in most cases, not entirely so. A certain portion of military force is absolutely necessary in large communities. Massachusetts is now feeling this necessity, and making provision for it. But how can this force be exerted on the States collectively? It is impossible. It amounts to a war between the two parties. Foreign powers also will not be idle spectators. They will interpose; the confusion will increase; and a dissolution of the Union will ensue.

5. *Influence*—he did not mean corruption, but a dispensation of those regular honors and emoluments which produce an attachment to the government. Almost all the weight of these is on the side of the States; and must continue so as long as the States continue to exist. All the passions, then, we see, of avarice, ambition, interest, which govern most individuals, and all public bodies, fall into the current of the States, and do not flow into the stream of the General Government. The former, therefore, will generally be an overmatch for the General Government, and render any confederacy in its very nature precarious. Theory is in this case fully confirmed by experience.

The Amphictyonic Council had, it would seem, ample powers for general purposes. It had, in particular, the power of fining and using force against, delinquent members. What was the consequence? Their decrees were mere signals of war. The Phocian war is a striking example of it. Philip at length, taking advantage of their disunion, and insinuating himself into their councils made himself master of their fortunes. The German confederacy affords another lesson. The authority of Charlemagne seemed to be as great as could be necessary. The great feudal chiefs, however, exercising their local sovereignties, soon felt the spirit, and found the means, of encroachments, which reduced the Imperial authority to a nominal sovereignty. The Diet has succeeded, which, though aided by a Prince at its head, of great authority independently of his imperial attributes, is a striking illustration of the weakness of confederated governments. Other examples instruct us in the same truth. The Swiss Cantons have scarce any union at all, and have been more than once at war with one another.

How then are all these evils to be avoided? Only by such a complete sovereignty in the General Government as will turn all the strong principles and passions above mentioned on its side. Does the scheme of New Jersey produce this effect? Does it afford any substantial remedy whatever? On the contrary it labors under great defects, and the defect of some of its provisions will destroy the efficacy of others. It gives a direct revenue to Congress, but this will not be sufficient. The balance can only be

supplied by requisitions; which experience proves cannot be relied on. If States are to deliberate on the mode, they will also deliberate on the object of the supplies, and will grant or not grant, as they approve or disapprove of it. The delinquency of one will invite and countenance it in others. Quotas, too, must, in the nature of things, be so unequal, as to produce the same evil.

To what standard will you resort? Land is a fallacious one. Compare Holland with Russia; France, or England, with other countries of Europe; Pennsylvania with North Carolina,—will the relative pecuniary abilities, in those instances, correspond with the relative value of land? Take numbers of inhabitants for the rule, and make like comparison of different countries, and you will find it to be equally unjust. The different degrees of industry and improvement in different countries render the first object a precarious measure of wealth. Much depends, too, on *situation*. Connecticut, New Jersey, and North Carolina not being commercial States, and contributing to the wealth of the commercial ones, can never bear quotas assessed by the ordinary rules of proportion. They will, and must, fail in their duty. Their example will be followed,—and the union itself be dissolved.

Whence, then, is the national revenue to be drawn? From commerce; even from exports, which, notwithstanding the common opinion, are fit objects of moderate taxation; from excise, etc., etc.—These, though not equal, are less unequal than quotas. Another destructive ingredient in the plan is that equality of suffrage which is so much desired by the small States. It is not in human nature that Virginia and the large States should consent to it; or, if they did, that they should long abide by it. It shocks too much all ideas of justice, and every human feeling. Bad principles in a government, though slow, are sure in their operation, and will gradually destroy it. A doubt has been raised whether Congress at present have a right to keep ships or troops in time of peace. He leans to the negative.

Mr. PATERSON'S plan provides no remedy. If the powers proposed were adequate, the organization of Congress is such, that they could never be properly and effectually exercised. The members of Congress, being chosen by the

States and subject to recall, represent all the local prejudices. Should the powers be found effectual, they will from time to time be heaped on them, till a tyrannic sway shall be established. The General power, whatever be its form, if it preserves itself, must swallow up the State powers. Otherwise, it will be swallowed up by them. It is against all the principles of a good government, to vest the requisite powers in such a body as Congress. Two sovereignties cannot co-exist within the same limits. Giving powers to Congress must eventuate in a bad government, or in no government. The plan of New Jersey, therefore, will not do. What, then, is to be done? Here he was embarrassed. The extent of the country to be governed discouraged him. The expense of a General Government was also formidable; unless there were such a diminution of expense on the side of the State Governments, as the case would admit. If they were extinguished, he was persuaded that great economy might be obtained by substituting a General Government. He did not mean, however, to shock the public opinion by proposing such a measure. On the other hand, he saw no *other* necessity for declining it. They are not necessary for any of the great purposes of commerce, revenue, or agriculture. Subordinate authorities, he was aware, would be necessary. There must be district tribunals; corporations for local purposes. But *cui bono* the vast and expensive apparatus now appertaining to the States? The only difficulty of a serious nature which occurred to him, was that of drawing representatives from the extremes to the centre of the community. What inducements can be offered that will suffice? The moderate wages for the first branch could only be a bait to little demagogues. Three dollars, or thereabouts, he supposed, would be the utmost.

The Senate, he feared, from a similar cause, would be filled by certain undertakers, who wish for particular offices under the government. This view of the subject almost led him to despair that a republican government could be established over so great an extent. He was sensible, at the same time, that it would be unwise to propose one of any other form. In his private opinion, he had no scruple in declaring, supported as he was by the opinion of so many of the wise and good, that the

British Government was the best in the world; and that he doubted much whether anything short of it would do in America. He hoped gentlemen of different opinions would bear with him in this, and begged them to recollect the change of opinion on this subject which had taken place, and was still going on. It was once thought that the power of Congress was amply sufficient to secure the end of their institution. The error was now seen by every one. The members most tenacious of republicanism, he observed, were as loud as any declaiming against the vices of democracy.

This progress of the public mind led him to anticipate the time, when others as well as himself, would join in the praise bestowed by Mr. NECKAR on the British Constitution, namely, that it is the only government in the world "which unites public strength with individual security." In every community where industry is encouraged, there will be a division of it into the few and many. Hence, separate interests will arise. There will be debtors and creditors, &c. Give all power to the many, they will oppress the few. Give all power to the few, they will oppress the many. Both, therefore, ought to have the power, that each may defend itself against the other. To the want of this check we owe our paper-money, installment laws, &c. To the proper adjustment of it the British owe the excellence of their Constitution. Their House of Lords is a most noble institution. Having nothing to hope for by a change, and a sufficient interest, by means of their property, in being faithful to the national interest, they form a permanent barrier against every pernicious innovation, whether attempted on the part of the Crown or of the Commons. No temporary Senate will have firmness enough to answer the purpose. The Senate of Maryland which seems to be so much appealed to, has not yet been sufficiently tried. Had the people been unanimous and eager in the late appeal to them on the subject of a paper emission, they would have yielded to the torrent. Their acquiescing in such an appeal is a proof of it. Gentlemen differ in their opinions concerning the necessary checks, from the different estimates they form of the human passions. They suppose seven years a sufficient period to give the Senate an ade-

quate firmness, from not duly considering the amazing violence and turbulence of the democratic spirit. When a great object of government is pursued, which seizes the popular passions, they spread like wild-fire and become irresistible. He appealed to the gentlemen from the New England States, whether experience had not there verified the remark.

As to the Executive, it seemed to be admitted that no good one could be established on republican principles. Was not this giving up the merits of the question; for can there be a good government without a good Executive? The English model was the only good one on this subject. The hereditary interest of the King was so interwoven with that of the nation, and his personal emolument so great, that he was placed above the danger of being corrupted from abroad; and at the same time was both sufficiently independent and sufficiently controlled, to answer the purpose of the institution at home. One of the weak sides of republics was their being liable to foreign influence and corruption. Men of little character, acquiring great power, become easily the tools of intermeddling neighbors. Sweden was a striking instance. The French and English had each their parties during the late revolution, which was effected by the predominant influence of the former. What is the inference from all these observations? That we ought to go as far, in order to attain stability and permanency, as republican principles will admit. Let one branch of the Legislature hold their places for life, or at least during good behavior. Let the Executive, also, be for life. He appealed to the feelings of the members present, whether a term of seven years would induce the sacrifices of private affairs which an acceptance of public trust would require, so as to ensure the services of the best citizens. On this plan, we should have in the Senate a permanent will, a weighty interest which would answer essential purposes. But is this a republican government, it will be asked. Yes, if all the magistrates are appointed and vacancies are filled by the people, or a process of election originating with the people. He was sensible that an Executive, constituted as he proposed would have in fact but little of the power and independence that might be necessary.

On the other plan of appointing him for seven years, he thought the Executive ought to have but little power. He would be ambitious, with the means of making creatures; and as the object of his ambition would be to *prolong* his power, it is probable that in case of war he would avail himself of the emergency, to evade or refuse a degradation from his place. An Executive for life has not this motive for forgetting his fidelity, and will therefore be a safer depository of power. It will be objected, probably, that such an Executive will be an *elective monarch*, and will give birth to the tumults which characterize that form of government. He would reply, that *monarch* is an indefinite term. It marks not either the degree or duration of power. If this Executive magistrate would be a monarch for life, the other proposed by the Report from the Committee of the Whole would be a monarch for seven years. The circumstance of being elective was also applicable to both. It had been observed by judicious writers, that elective monarchies would be the best if they could be guarded against the *tumults* excited by the ambition and intrigues of competitors. He was not sure that tumults were an inseparable evil. He thought this character of elective monarchies had been taken rather from particular cases, than from general principles. The election of Roman Emperors was made by the *army*. In *Poland* the election is made by great rival *princes*, with independent power, and ample means of raising commotions. In the German Empire, the appointment is made by the Electors and Princes, who have equal motives and means for exciting cabals and parties. Might not such a mode of election be devised among ourselves, as will defend the community against these effects in any dangerous degree? Having made these observations, he would read to the Committee a sketch of a plan which he should prefer to either of those under consideration. He was aware that it went beyond the ideas of most members. But will such a plan be adopted out of doors? In return he would ask, will the people adopt the other plan? At present they will adopt neither. But he sees the Union dissolving, or already dissolved—he sees evils operating in the States which must soon cure the people of their fondness for democ-

racies—he sees that a great progress has been already made, and is still going on, in the public mind. He thinks, therefore, that the people will in time be unshackled from their prejudices; and whenever that happens, they will themselves not be satisfied at stopping where the plan of Mr. RANDOLPH would place them, but be ready to go as far at least as he proposes.

He did not mean to offer the paper he had sketched as a proposition to the Committee. It was meant only to give a more correct view of his ideas, and to suggest the amendments which he should probably propose to the plan of Mr. RANDOLPH, in the proper stages of its future discussion. He reads his sketch in the words following, to wit:

“I. The supreme Legislative power of the United States of America to be vested in two different bodies of men; the one to be called the Assembly; the other the Senate; who together shall form the Legislature of the United States, with power to pass all laws whatsoever, subject to the negative hereafter mentioned.

“II. The Assembly to consist of persons elected by the people to serve for three years.

“III. The Senate to consist of persons elected to serve during good behavior; their election to be made by electors chosen for that purpose by the people. In order to do this, the States to be divided into election districts. On the death, removal or resignation of any Senator, his place to be filled out of the district from which he came.

“IV. The supreme Executive authority of the United States to be vested in a Governor, to be elected to serve during good behavior; the election to be made by Electors chosen by the people in the Election Districts aforesaid. The authorities and functions of the Executive to be as follows: to have a negative on all laws about to be passed, and the execution of all laws passed; to have the direction of war when authorized or begun; to have, with the advice and approbation of the Senate, the power of making all treaties; to have the sole appointment of the heads or chief officers of the Departments of Finance, War, and Foreign Affairs; to have the nomination of all other officers (ambassadors to foreign nations included), subject to the approbation or rejection of the Senate; to have

the power of pardoning all offences except treason, which he shall not pardon without the approbation of the Senate.

"V. On the death, resignation, or removal of the Governor, his authorities to be exercised by the President of the Senate till a successor be appointed.

"VI. The Senate to have the sole power of declaring war; the power of advising and approving all treaties; the power of approving or rejecting all appointments of officers, except the heads or chiefs of the Departments of Finance, War, and Foreign Affairs.

"VII. The supreme Judicial authority to be vested in Judges, to hold their offices during good behavior, with adequate and permanent salaries. This court to have original jurisdiction in all causes of capture, and an appellate jurisdiction in all causes in which the revenues of the General Government, or the citizens of foreign nations, are concerned.

"VIII. The Legislature of the United States to have power to institute courts in each State for the determination of all matters of general concern.

"IX. The Governor, Senators, and all officers of the United States, to be liable to impeachment for mal-, and corrupt conduct; and upon conviction to be removed from office, and disqualified for holding any place of trust or profit; all impeachments to be tried by a Court to consist of the Chief———, or Judge of the Superior Court of Law of each State, provided such Judge shall hold his place during good behavior and have a permanent salary.

"X. All laws of the particular States contrary to the Constitution or laws of the United States to be utterly void; and the better to prevent such laws being passed, the Governor or President of each State shall be appointed by the General Government, and shall have a negative upon the laws about to be passed in the State of which he is the Governor or President.

"XI. No State to have any forces, land or naval; and the militia of all the States to be under the sole and exclusive direction of the United States, the officers of which to be appointed and commissioned by them."

¹ Journal, 175, 187.

Mr. Hamilton did not consider that the above propositions embodied his ideas of what the Constitution should embrace. Towards the close of the Convention he submitted the preceding plan of a Constitution, but this was never considered in the Convention, probably owing to Mr. Hamilton's delay in submitting it.

Appendix No. 9.

REPORT OF THE COMMITTEE OF THE WHOLE

To the Convention.

The following is the report of the Committee of the Whole made to the Convention on the 13th of June, 1787.

This is the first report ever made by an authorized body of men looking to the formation of a Constitution for the United States. It was made after the Convention had been in session about six weeks.

1. Resolved that it is the opinion of this Committee, that a national Government ought to be established, consisting of a supreme Legislative, Executive and Judiciary.

2. Resolved, that the National Legislature ought to consist of two branches.

3. Resolved, that the members of the first branch of the National Legislature ought to be elected by the people of the several States for the term of three years, to receive fixed stipends by which they may be compensated for the devotion of their time to the public service, to be paid out of the National Treasury: to be ineligible to any office established by a particular State, or under the authority of the United States (except those peculiarly belonging to the functions of the first branch), during the term of service, and under the national Government for the space of one year after its expiration.

4. Resolved, that the members of the second branch of the National Legislature ought to be chosen by the individual Legislatures; to be of the age of thirty years at least; to hold their offices for a term sufficient to ensure their independence, namely, seven years; to receive fixed stipends by which they may be compensated for the

devotion of their time to the public service, to be paid out of the National Treasury; to be ineligible to any office established by a particular State, or under the authority of the United States (except those peculiarly belonging to the functions of the second branch), during the term of service, and under the national Government for the space of one year after its expiration.

5. Resolved, that each branch ought to possess the right of originating acts.

6. Resolved, that the National Legislature ought to be empowered to enjoy the legislative rights vested in Congress by the Confederation; and moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several States contravening, in the opinion of the National Legislature, the Articles of Union, or any treaties subsisting under the authority of the Union.

7. Resolved, that the rights of suffrage in the first branch of the National Legislature, ought not to be according to the rule established in the Articles of Confederation, but according to some equitable ratio of representation, namely, in proportion to the whole number of white and other free citizens and inhabitants, of every age, sex and condition, including those bound to servitude for a term of years, and three-fifths of all other persons, not comprehended in the foregoing description, except Indians not paying taxes, in each State.

8. Resolved, that the right of suffrage in the second branch of the National Legislature, ought to be according to the rule established for the first.

9. Resolved, that a National Executive be instituted, to consist of a single person; to be chosen by the National Legislature, for the term of seven years; with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be ineligible a second time; *and to be removable on impeachment and conviction* of malpractices or neglect of duty; to receive a fixed stipend by which he may be compensated for the devotion of his time to the public service, to be paid out of the National Treasury.

10. Resolved, that the national Executive shall have a right to negative any legislative act, which shall not be afterwards passed by two-thirds of each branch of the National Legislature.

11. Resolved, that a national Judiciary be established, to consist of one supreme tribunal, the Judges of which *shall be appointed by the second branch of the national Legislature*, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution.

12. Resolved, that the National Legislature be empowered to appoint inferior tribunals.

13. Resolved, that the jurisdiction of the national Judiciary shall extend to all cases which respect the collection of the national revenue, impeachments of any national officers, and questions which involve the national peace and harmony.

14. Resolved, that provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

15. Resolved, that provision ought to be made for the continuance of Congress and their authorities and privileges, until a given day, after the reform of the Articles of the Union shall be adopted, and for the completion of all their engagements.

16. Resolved, that a republican constitution, and its existing laws, ought to be guaranteed to each State by the United States.

17. Resolved, that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.

18. Resolved, that the Legislative, Executive and Judiciary powers within the several States ought to be bound by oath to support the Articles of Union.

19. Resolved, that the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times after the approbation of Con-

gress, to be submitted to an assembly or assemblies recommended by the several Legislatures, to be expressly chosen by the people to consider and decide thereon.¹

Appendix No. 10.

RESOLUTIONS ADOPTED BY THE CONVENTION

And referred to the Committee of Detail.

On the 26th of July the Convention referred the resolutions which it had adopted to the Committee of Detail. The resolutions are as follows:

1. *Resolved*, That the Government of the United States ought to consist of a supreme Legislative, Judiciary, and Executive.

2. *Resolved*, That the Legislature consist of two branches.

3. *Resolved*, That the members of the first branch of the Legislature ought to be elected by the people of the several States for the term of two years; to be paid out of the public treasury; to receive an adequate compensation for their services; to be of the age of twenty-five years at least; to be ineligible to, and incapable of holding, any office under the authority of the United States (except those peculiarly belonging to the functions of the first branch) during the term of service of the first branch.

4. *Resolved*, That the members of the second branch of the Legislature of the United States ought to be chosen by the individual Legislatures; to be of the age of thirty years at least; to hold their offices for six years, one-third to go out biennially; to receive a compensation for the devotion of their time to the public service; to be ineligible to, and incapable of holding, any office under the authority of the United States (except those peculiarly belonging to the functions of the second branch) during the term for which they are elected, and for one year thereafter.

5. *Resolved*, That each branch ought to possess the right of originating acts.

¹ Journal, 160-162.

6. *Resolved*, That the National Legislature ought to possess the legislative rights vested in Congress by the Confederation; and, moreover, to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation.

7. *Resolved*, That the legislative acts of the United States, made by virtue and in pursuance of the Articles of Union, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective States, as far as those acts or treaties shall relate to the said States, or their citizens and inhabitants; and that the Judiciaries of the several States shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding.

8. *Resolved*, That in the original formation of the Legislature of the United States, the first branch thereof shall consist of sixty-five members; of which number,

New Hampshire shall send.....	three,
Massachusetts	eight,
Rhode Island.....	one,
Connecticut	five,
New York	six,
New Jersey	four,
Pennsylvania	eight,
Delaware	one,
Maryland	six,
Virginia	ten,
North Carolina.....	five,
South Carolina.....	five,
Georgia	three.

But as the present situation of the States, may probably alter in the number of their inhabitants, the Legislature of the United States shall be authorized, from time to time, to apportion the number of representatives; and in case any of the States shall hereafter be divided, or enlarged by addition of territory, or any two or more States united, or any new States created within the lim-

its of the United States, the Legislature of the United States shall possess authority to regulate the number of representatives, in any of the foregoing cases, upon the principle of their number of inhabitants, according to the provisions hereafter mentioned, namely,—Provided, always, that representation ought to be proportioned to direct taxation. And in order to ascertain the alteration in the direct taxation, which may be required from time to time, by the changes in the relative circumstances of the States,—

9. *Resolved*, That a census be taken within six years from the first meeting of the Legislature of the United States, and once within the term of every ten years afterwards, of all the inhabitants of the United States, in the manner and according to the ratio recommended by Congress in their resolution of the eighteenth of April, 1783; and that the Legislature of the United States shall apportion the direct taxation accordingly.

10. *Resolved*, That all bills for raising or appropriating money, and for fixing the salaries of the officers of the Government of the United States, shall originate in the first branch of the Legislature of the United States, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated by the first branch.

11. *Resolved*, That in the second branch of the Legislature of the United States, each State shall have an equal vote.

12. *Resolved*, That a National Executive be instituted, to consist of a single person; to be chosen by the National Legislature, for the term of seven years; to be ineligible a second time; with power to carry into execution the national laws; to appoint to offices in cases not otherwise provided for; to be removable on impeachment, and conviction of malpractice or neglect of duty; to receive a fixed compensation for the devotion of his time to the public service, to be paid out of the public treasury.

13. *Resolved*, That the National Executive shall have a right to negative any legislative act; which shall not be afterwards passed, unless by two-third parts of each branch of the National Legislature.

14. *Resolved*, That a National Judiciary be established, to consist of one supreme tribunal, the Judges of which shall be appointed by the second branch of the national Legislature; to hold their offices during good behavior; to receive punctually at stated times, a fixed compensation for their services, in which no diminution shall be made so as to affect the persons actually in office at the time of such diminution.

15. *Resolved*, That the National Legislature be empowered to appoint inferior tribunals.

16. *Resolved*, That the jurisdiction of the National Judiciary shall extend to cases arising under laws passed by the General Legislature; and to such other questions as involve the national peace and harmony.

17. *Resolved*, That provision ought to be made for the admission of States lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the National Legislature less than the whole.

18. *Resolved*, That a republican form of government shall be guaranteed to each State; and that each State shall be protected against foreign and domestic violence.

19. *Resolved*, That provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary.

20. *Resolved*, That the Legislative, Executive and Judiciary powers, within the several States, and of the National Government, ought to be bound, by oath, to support the Articles of Union.

21. *Resolved*, That the amendments which shall be offered to the Confederation by the Convention ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly, or assemblies, of representatives, recommended by the several Legislatures, to be expressly chosen by the people to consider and decide thereon.

22. *Resolved*, That the representation in the second branch of the Legislature of the United States shall consist of two members from each State, who shall vote *per capita*.

23. *Resolved*, That it be an instruction to the Commit-

tee to whom were referred the proceedings of the Convention for the establishment of a National Government, to receive a clause, or clauses, requiring certain qualifications of property and citizenship in the United States, for the Executive, the Judiciary, and the members of both branches of the Legislature of the United States.¹

Appendix No. 11.

REPORT OF THE COMMITTEE OF DETAIL.

August 6, 1787.

Mr. Rutledge, Chairman of the Committee of Detail, reported as follows:

We, the people of the States of New Hampshire, Massachusetts, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia, do ordain, declare and establish, the following Constitution for the government of ourselves, and our posterity:

ARTICLE I.

The style of the Government shall be, "The United States of America."

ARTICLE II.

The Government shall consist of supreme Legislative, Executive, and Judicial powers.

ARTICLE III.

The legislative power shall be vested in a Congress, to consist of two separate and distinct bodies of men, a House of Representatives and a Senate; each of which shall in all cases have a negative on the other. The Legislature shall meet on the first Monday in December in every year.

ARTICLE IV.

Sec. 1. The members of the House of Representatives shall be chosen every second year, by the people of the

¹ Journal, 444-449.

several States comprehended within this Union. The qualifications of the electors shall be the same from time to time, as those of the electors in the several States, of the most numerous branch of their own Legislatures.

Sec. 2. Every member of the House of Representatives shall be of the age of twenty-five years at least; shall have been a citizen in the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State in which he shall be chosen.

Sec. 3. The House of Representatives shall, at its first formation, and until the number of citizens and inhabitants shall be taken in the manner hereinafter described, consist of sixty-five members, of whom three shall be chosen in New Hampshire, eight in Massachusetts, one in Rhode Island and Providence Plantations, five in Connecticut, six in New York, four in New Jersey, eight in Pennsylvania, one in Delaware, six in Maryland, ten in Virginia, five in North Carolina, five in South Carolina, and three in Georgia.

Sec. 4. As the proportions of numbers in different States will alter from time to time; as some of the States may hereafter be divided; as others may be enlarged by addition of territory; as two or more States may be united; as new States will be erected within the limits of the United States, the Legislature shall, in each of these cases, regulate the number of Representatives by the number of inhabitants according to the provisions hereinafter made, at the rate of one for every forty thousand.

Sec. 5. All bills for raising or appropriating money, for fixing the salaries of the officers of government, shall originate in the House of Representatives, and shall not be altered or amended by the Senate. No money shall be drawn from the public treasury, but in pursuance of appropriations that shall originate in the House of Representatives.

Sec. 6. The House of Representatives shall have the sole power of impeachment. It shall choose its Speaker and other officers.

Sec. 7. Vacancies in the House of Representatives shall be supplied by writs of election from the Executive

authority of the State in the representation from which they shall happen.

ARTICLE V.

Sec. 1. The Senate of the United States shall be chosen by the Legislatures of the several States. Each Legislature shall choose two members. Vacancies may be supplied by the Executive until the next meeting of the Legislature. Each member shall have one vote.

Sec. 2. The Senators shall be chosen for six years; but immediately after the first election, they shall be divided, by lot, into three classes, as nearly as may be, numbered one, two, and three. The seats of the members of the first class shall be vacated at the expiration of the second year; of the second class at the expiration of the fourth year; of the third class at the expiration of the sixth year; so that a third part of the members may be chosen every second year.

Sec. 3. Every member of the Senate shall be of the age of thirty years at least; shall have been a citizen in the United States for at least four years before his election; and shall be at the time of his election, a resident of the State for which he shall be chosen.

Sec. 4. The Senate shall choose its own President and other officers.

ARTICLE VI.

Sec. 1. The times, and places, and manner of holding the elections of the members of each House, shall be prescribed by the Legislature of each State; but their provisions concerning them may, at any time, be altered by the Legislature of the United States.

Sec. 2. The Legislature of the United States shall have authority to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient.

Sec. 3. In each House a majority of the members shall constitute a quorum to do business; but a smaller number may adjourn from day to day.

Sec. 4. Each House shall be the judge of the elections, returns and qualifications, of its own members.

Sec. 5. Freedom of speech and debate in the Legisla-

ture shall not be impeached or questioned in any court or place out of the Legislature; and the members of each House shall, in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at Congress, and in going to and returning from it.

Sec. 6. Each House may determine the rules of its proceedings; may punish its members for disorderly behavior; and may expel a member.

Sec. 7. The House of Representatives, and the Senate, when it shall be acting in a legislative capacity, shall keep a journal of their proceedings; and shall, from time to time, publish them; and the yeas and nays of the members of each House, on any question, shall, at the desire of one-fifth part of the members present, be entered on the journal.

Sec. 8. Neither House, without the consent of the other, shall adjourn for more than three days, nor to any other place than that at which the two Houses are sitting. But this regulation shall not extend to the Senate when it shall exercise the powers mentioned in the — Article.

Sec. 9. The members of each House shall be ineligible to, and incapable of holding, any office under the authority of the United States, during the time for which they shall respectively be elected: and the members of the Senate shall be ineligible to, and incapable of holding, any such office for one year afterwards.

Sec. 10. The members of each House shall receive a compensation for their services, to be ascertained and paid by the State in which they shall be chosen.

Sec. 11. The enacting style of the laws of the United States shall be, "Be it enacted, and it is hereby enacted, by the House of Representatives, and by the Senate of the United States, in Congress assembled."

Sec. 12. Each House shall possess the right of originating bills, except in the cases before mentioned.

Sec. 13. Every bill, which shall have passed the House of Representatives and the Senate, shall, before it becomes a law, be presented to the President of the United States for his revision. If, upon such revision, he approve of it, he shall signify his approbation by signing it. But

if, upon such revision, it shall appear to him improper for being passed into a law, he shall return it, together with his objections against it, to that House in which it shall have originated; who shall enter the objections at large on their Journal, and proceed to reconsider the bill. But if, after such reconsideration, two-thirds of that House shall, notwithstanding the objections of the President, agree to pass it, it shall, together with his objections, be sent to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of the other House also, it shall become a law. But in all such cases, the votes of both Houses shall be determined by Yeas and Nays; and the names of the persons voting for or against the bill, shall be entered on the Journal of each House respectively. If any bill shall not be returned by the President within seven days after it shall have been presented to him, it shall be a law, unless the Legislature, by their adjournment, prevent its return; in which case it shall not be a law.

ARTICLE VII.

Sec. 1. The Legislature of the United States shall have the power to lay and collect taxes, duties, imposts and excises;

To regulate commerce with foreign nations, and among the several States;

To establish an uniform rule of naturalization throughout the United States;

To coin money;

To regulate the value of foreign coin;

To fix the standard of weights and measures;

To establish post-offices;

To borrow money, and emit bills on the credit of the United States;

To appoint a Treasurer by ballot;

To constitute tribunals inferior to the-Supreme Court;

To make rules concerning captures on land and water;

To declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations;

To subdue a rebellion in any State, on the application of its Legislature;

To make war;

To raise armies;

To build and equip fleets;

To call forth the aid of the militia, in order to execute the laws of the Union, enforce treaties, suppress insurrections, and repel invasions;

And to make all laws that shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or office thereof.

Sec. 2. Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The Legislature of the United States shall have power to declare the punishment of treason. No person shall be convicted of treason, unless on the testimony of two witnesses. No attainder of treason shall work corruption of blood, nor forfeiture, except during the life of the person attainted.

Sec. 3. The proportions of direct taxation shall be regulated by the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound for servitude for a term of years, and three-fifths of all other persons not comprehended in the foregoing description (except Indians not paying taxes); which number shall, within six years after the first meeting of the Legislature, and within the term of every ten years afterwards, be taken in such a manner as the said Legislature shall direct.

Sec. 4. No tax or duty shall be laid by the Legislature on articles exported from any State; nor on the migration or importation of such persons as the several States shall think proper to admit; nor shall such migration or importation be prohibited.

Sec. 5. No capitation tax shall be laid, unless in proportion to the census herein before directed to be taken.

Sec. 6. No navigation act shall be passed without the assent of two-thirds of the members present in each House.

Sec. 7. The United States shall not grant any title of nobility.

ARTICLE VIII.

The acts of the Legislature of the United States made in pursuance of this Constitution, and all treaties made under the authority of the United States, shall be the supreme law of the several States, and of their citizens and inhabitants; and the Judges in the several States shall be bound thereby in their decisions, anything in the Constitution or laws of the several States to the contrary notwithstanding.

ARTICLE IX.

Sec. 1. The Senate of the United States shall have power to make treaties, and to appoint ambassadors, and Judges of the Supreme Court.

Sec. 2. In all disputes and controversies now subsisting, or that may hereafter subsist, between two or more States, respecting jurisdiction or territory, the Senate shall possess the following powers: Whenever the Legislature, or the Executive authority, or lawful agent of any State, in controversy with another, shall by memorial to the Senate, state the matter in question, and apply for a hearing, notice of such memorial and application shall be given by order of the Senate, to the Legislature, or the Executive authority, of the other State in controversy. The Senate shall also assign a day for the appearance of the parties, by their agents, before that House. The agents shall be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question. But if the agents cannot agree, the Senate shall name three persons out of each of the several States; and from the list of such persons, each party shall alternately strike out one, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as the Senate shall direct, shall, in their presence, be drawn out by lot; and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy; provided a majority of the judges who

shall hear the cause agree in the determination. If either party shall neglect to attend at the day assigned, without showing sufficient reasons for not attending, or being present shall refuse to strike, the Senate shall proceed to nominate three persons out of each State, and the Clerk of the Senate shall strike in behalf of the party absent or refusing. If any of the parties shall refuse to submit to the authority of such court, or shall not appear to prosecute or defend their claim or cause, the court shall nevertheless proceed to pronounce judgment. The judgment shall be final and conclusive. The proceedings shall be transmitted to the President of the Senate, and shall be lodged among the public records for the security of the parties concerned. Every commissioner shall, before he sit in judgment, take an oath to be administered by one of the judges of the Supreme or Superior Court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward."

Sec. 3. All controversies concerning lands claimed under different grants of two or more States, whose jurisdictions, as they respect such lands, shall have been decided or adjusted subsequently to such grants, or any of them, shall, on application to the Senate, be finally determined, as near as may be, in the same manner as is before prescribed for deciding controversies between different States.

ARTICLE X.

Sec. 1. The Executive power of the United States shall be vested in a single person. His style shall be, "The President of the United States of America," and his title shall be, "His Excellency." He shall be elected by ballot by the Legislature. He shall hold his office during the term of seven years; but shall not be elected a second time.

Sec. 2. He shall, from time to time, give information to the Legislature, of the state of the Union. He may recommend to their consideration such measures as he shall judge necessary, and expedient. He may convene them on extraordinary occasions. In case of disagreement

between the two Houses, with regard to the time of adjournment, he may adjourn them to such time as he thinks proper. He shall take care that the laws of the United States be duly and faithfully executed. He shall commission all the officers of the United States; and shall appoint officers in all cases not otherwise provided for by this Constitution. He shall receive Ambassadors, and may correspond with the supreme executives of the several States. He shall have power to grant reprieves and pardons, but his pardon shall not be pleadable in bar of an impeachment. He shall be Commander-in-chief of the army and navy of the United States, and of the militia of the several States. He shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during his continuance in office. Before he shall enter on the duties of his department, he shall take the following oath or affirmation, "I — solemnly swear (or affirm), that I will faithfully execute the office of President of the United States of America." He shall be removed from his office on impeachment by the House of Representatives, and conviction in the Supreme Court, of treason, bribery, or corruption. In case of his removal, as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.

ARTICLE XI.

Sec. 1. The Judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts, as shall, when necessary, from time to time, be constituted by the Legislature of the United States.

Sec. 2. The Judges of the Supreme Court, and of the inferior courts, shall hold their offices during good behavior. They shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Sec. 3. The jurisdiction of the Supreme Court shall extend to all cases arising under laws passed by the Legislature of the United States; to all cases affecting

ambassadors, other public ministers and consuls; to the trial of impeachments of officers of the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States, except such as shall regard territory or jurisdiction; between a State and citizens of another State; between citizens of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects. In cases of impeachment, cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party, this jurisdiction shall be original. In all the other cases before mentioned, it shall be appellate, with such exceptions, and under such regulations, as the Legislature shall make. The Legislature may assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner and under the limitations which it shall think proper, to such inferior courts, as it shall constitute from time to time.

Sec. 4. The trial of all criminal offences (except in cases of impeachment) shall be in the State where they shall be committed; and shall be by jury.

Sec. 5. Judgment, in cases of impeachment, shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit, under the United States. But the party convicted shall nevertheless be liable and subject to indictment, trial, judgment and punishment according to law.

ARTICLE XII.

No State shall coin money; nor grant letters of marque and reprisal; nor enter into any treaty, alliance or confederation; nor grant any title of nobility.

ARTICLE XIII.

No State, without the consent of the Legislature of the United States, shall emit bills of credit, or make anything but specie a tender in payment of debts; nor lay imposts or duties on imports; nor keep troops or ships of war in time of peace; nor enter into any agreement or compact with another State, or with any foreign power; nor engage in any war, unless it shall be actually invaded

by enemies, or the danger of invasion be so imminent as not to admit of a delay until the Legislature of the United States can be consulted.

ARTICLE XIV.

The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

ARTICLE XV.

Any person charged with treason, felony or high misdemeanor in any State, who shall flee from justice, and shall be found in any other State, shall, on demand of the Executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of the offence.

ARTICLE XVI.

Full faith shall be given in each State to the acts of the Legislatures, and to the records and judicial proceedings of the courts and magistrates, of every other State.

ARTICLE XVII.

New States lawfully constituted or established within the limits of the United States may be admitted, by the Legislature, into this Government; but to such admission the consent of two-thirds of the members present in each House shall be necessary. If a new State shall arise within the limits of any of the present States, the consent of the Legislatures of such States shall also be necessary to its admission. If the admission be consented to, the new States shall be admitted on the same terms with the original States. But the Legislature may make conditions with the new States, concerning the public debt which shall be then subsisting.

ARTICLE XVIII.

The United States shall guarantee to each State a republican form of government; and shall protect each State against foreign invasions, and, on the application of its Legislature, against domestic violence.

ARTICLE XIX.

On the application of the Legislatures of two-thirds of the States in the Union, for an amendment of this Constitution, the Legislature of the United States shall call a convention for that purpose.

ARTICLE XX.

The members of the Legislatures, and the Executive and Judicial officers of the United States, and of the several States, shall be bound by oath to support this Constitution.

ARTICLE XXI.

The ratification of the Conventions of — States shall be sufficient for organizing this Constitution.

ARTICLE XXII.

This Constitution shall be laid before the United States in Congress assembled, for their approbation; and it is the opinion of this Convention, that it should be afterwards submitted to a Convention chosen in each State, under the recommendation of its Legislature, in order to receive the ratification of such Convention.

ARTICLE XXIII.

To introduce this government, it is the opinion of this Convention, that each assenting Convention should notify its assent and ratification to the United States in Congress assembled; that Congress, after receiving the assent and ratification of the Conventions of — States, should appoint and publish a day, as early as may be, and appoint a place, for commencing proceedings under this Constitution; that after such publication, the Legislatures of the several States should elect members of the Senate and direct the election of members of the House of Representatives; and that the members of the Legislature should meet at the time and place assigned by Congress, and should, as soon as may be after their meeting, choose the President of the United States, and proceed to execute this Constitution.¹

¹ Journal, 449-462.

On the 18th of August Mr. Madison submitted to the Convention, in order that that body might refer them to the Committee of Detail, the following propositions as proper to be added to the general powers which the Constitution proposed to confer upon Congress:

“To dispose of the unappropriated lands of the United States.

“To institute temporary governments for new States arising therein.

“To regulate affairs with the Indians, as well within as without the limits of the United States.

“To exercise exclusively legislative authority at the seat of the General Government, and over a district around the same not exceeding — square miles; the consent of the Legislature of the State or States, comprising the same, being first obtained.

“To grant charters of corporations in cases where the public good may require them, and the authority of a single State may be incompetent.

“To secure to literary authors their copyrights for a limited time.

“To establish a university.

“To encourage by premiums and provisions the advancement of useful knowledge and discoveries.

“To authorize the Executive to procure, and hold for the use of the United States, landed property for the erection of forts, magazines, and other necessary buildings.”

On the same day Mr. Charles Pinckney moved that the following propositions be submitted in the same way and for the same purpose:

“To fix and permanently establish the seat of government of the United States, in which they shall possess the exclusive right of soil and jurisdiction.

“To establish seminaries for the promotion of literature and the arts and sciences.

“To grant charters of incorporation.

“To grant patents for useful inventions.

“To secure to authors exclusive rights for a certain time.

“To establish public institutions, rewards, and immuni-

ties for the promotion of agriculture, commerce, trades, and manufactures.

“That funds which shall be appropriated for the payment of public creditors, shall not during the time of such appropriation, be diverted or applied to any other purpose, and that the Committee prepare a clause or clauses for restraining the Legislature of the United States from establishing a perpetual revenue.

“To secure the payment of the public debt.

“To secure all creditors under the new Constitution from a violation of the public faith when pledged by the authority of the Legislature.

“To grant letters of marque and reprisal.

“To regulate stages on the post-roads.”¹

These propositions and those submitted to Mr. Madison were referred to the Committee of Detail.

Appendix No. 12.

CONSTITUTION OF THE UNITED STATES.

PREAMBLE.

We, the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

ARTICLE I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have

¹ Journal, 549-551.

attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three-fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall choose their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one-third may be chosen every second Year; and if Vacancies happen by Resignation, or otherwise, during the Recess of the Leg-

islature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.

No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two-thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day.

Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller Number may adjourn from day to day, and may be authorized to compel the Attend-

ance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the desire of one fifth of those present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

Section 6. The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the authority of the United States, which shall have been created, or the Emoluments whereof shall have been increased, during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

Section 7. All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree

to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the Credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors

the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and Punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Section 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a

Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

No Bill of Attainder or ex post facto Law shall be passed.

No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.

No Tax or Duty shall be laid on Articles exported from any State.

No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another: nor shall Vessels bound to, or from, one State, be obliged to enter, clear, or pay Duties in another.

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such

Laws shall be subject to the Revision and Control of the Congress.

No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into any Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.

ARTICLE II.

Section 1. The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.

The electors shall meet in their respective States, and vote by ballot for two Persons, of whom one at least shall not be an Inhabitant of the same State with themselves. And they shall make a List of all the Persons voted for, and of the Number of Votes for each; which List they shall sign and certify, and transmit sealed to the Seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the Presence of the Senate and House of Representatives, open all the Certificates, and the Votes shall then be counted. The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately choose by Ballot one of them for President; and if no person have a Majority, then from the five highest on the List the said House shall in like Manner choose the President. But in choosing the President, the Votes shall be taken by States, the

Representation from each State having one Vote; A quorum for this Purpose shall consist of a Member or Members from two-thirds of the States, and a Majority of all the States shall be necessary to a Choice. In every Case, after the Choice of the President, the person having the greatest Number of Votes of the Electors shall be the Vice President. But if there should remain two or more who have equal Votes, the Senate shall choose from them by Ballot the Vice-President.

The Congress may determine the Time of choosing the Electors, and the Day on which they shall give their Votes; which Day shall be the same throughout the United States.

No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation, or Inability, both of the President and Vice-President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.

The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."

Section 2. The President shall be Commander in Chief

of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session.

Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Section 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction, in all the other cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punish-

ment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

ARTICLE IV.

Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on

Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

ARTICLE V.

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

ARTICLE VI.

All Debts contracted and Engagements entered into, before the Adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

ARTICLE VII.

The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.

Done in Convention by the Unanimous Consent of the States present the Seventeenth Day of September in the Year of Our Lord one thousand seven hundred and Eighty seven and of the Independence of the United States of America the Twelfth. IN WITNESS whereof We have hereunto subscribed our Names,

Go. WASHINGTON—Presidt.

and deputy from Virginia

Attest William Jackson Secretary.

New Hampshire { JOHN LANGDON
NICHOLAS GILMAN

Massachusetts { NATHANIEL GORHAM
RUFUS KING

Connecticut { WM. SAML. JOHNSON
ROGER SHEERMAN

New York, ALEXANDER HAMILTON

New Jersey { WIL: LIVINGSTON
DAVID BREARLEY.
WM. PATERSON.
JONA: DAYTON

Pennsylvania { B. FRANKLIN
THOMAS MIFFLIN
ROBT. MORRIS
GEO. CLYMER
THOS. FITZSIMONS
JARED INGERSOLL
JAMES WILSON
GOUV. MORRIS

Delaware { GEO: READ
GUNNING BEDFORD jun
JOHN DICKINSON
RICHARD BASSETT
JACO: BROOM

RESOLUTIONS SENDING CONSTITUTION TO CONGRESS. 1771

Maryland	{ JAMES MCHENRY DAN OF ST. THOS. JENIFER DANL. CARROLL
Virginia	{ JOHN BLAIR— JAMES MADISON JR.
North Carolina	{ WM. BLOUNT RICHD. DOBBS SPAIGHT. HU WILLIAMSON
South Carolina	{ J. RUTLEDGE CHARLES COTESWORTH PINCKNEY CHARLES PINCKNEY PIERCE BUTLER.
Georgia	{ WILLIAM FEW ABB BALDWIN

Appendix No. 13.

RESOLUTIONS ADOPTED BY THE CONSTITUTIONAL
CONVENTION

Directing That the Constitution be Transmitted to Congress.

IN CONVENTION, MONDAY, SEPTEMBER 17, 1787.

Present: The States of New Hampshire, Massachusetts, Connecticut, Mr. Hamilton from New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

Resolved, That the preceding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention, assenting to, and ratifying the Same, should give Notice thereof; to the United States in Congress assembled.

Resolved, That it is the Opinion of this Convention, that as soon as the Conventions of nine States shall have rati-

fied this Constitution, the United States in Congress assembled should fix a Day on which Electors should be appointed by the States which shall have ratified the same, and a Day on which the Electors should assemble to vote for the President, and the Time and Place for commencing Proceedings under this Constitution. That after such Publication the Electors should be appointed, and the Senators and Representatives elected: that the Electors should meet on the Day fixed for the Election of the President, and should transmit their Votes certified, signed, sealed, and directed as the Constitution requires, to the Secretary of the United States in Congress assembled, that the Senators and Representatives should convene at the Time and Place assigned; that the Senators should appoint a President of the Senate, for the sole Purpose of receiving, opening, and counting the Votes for President; and, that, after he shall be chosen, the Congress, together with the President, should, without Delay, proceed to execute this Constitution.

By the Unanimous Order of the Convention.

Geo. Washington, *Presid.*

W. Jackson, Secretary.

COPY OF PRESIDENT WASHINGTON'S LETTER
TRANSMITTING THE CONSTITUTION TO
CONGRESS.

IN CONVENTION, SEPTEMBER 17, 1787.

"Sir: We have now the honor to submit to the consideration of the United States, in Congress assembled, that Constitution which has appeared to us the most advisable.

"The friends of our country have long seen and desired that the power of making war, peace, and treaties, that of levying money and regulating commerce, and the correspondent executive and judicial authorities, should be fully and effectually vested in the General Government of the Union; but the impropriety of delegating such extensive trust to one body of men is evident. Thence results the necessity of a different organization.

"It is obviously impracticable, in the Federal Government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest. The magnitude of the sacrifice must depend as well on situation and circumstances as on the object to be obtained. It is at all times difficult to draw with precision the line between those rights which must be surrendered and those which may be reserved; and on the present occasion this difficulty was increased by a difference among the several States as to their situation, extent, habits, and particular interests.

"In all our deliberations on this subject, we kept steadily in our view that which appears to us the greatest interest of every true American—the consolidation of our Union—in which is involved our prosperity, felicity, safety, perhaps our national existence. This important consideration, seriously and deeply impressed on our minds, led each State in the Convention to be less rigid in points of inferior magnitude than might have been otherwise expected. And thus the Constitution which we now present is the result of a spirit of amity, and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable.

"That it will meet the full and entire approbation of every State is not, perhaps, to be expected. But each will doubtless consider, that had her interest alone been consulted, the consequences might have been particularly disagreeable and injurious to others. That it is liable to as few exceptions as could reasonably have been expected, we hope and believe; that it may promote the lasting welfare of that country so dear to us all; and secure her freedom and happiness, is our most ardent wish.

With great respect, we have the honor to be, sir, your excellency's most obedient, humble servants.

By unanimous order of the Convention.

George Washington, *President*.

His Excellency the PRESIDENT OF CONGRESS.

Appendix No. 14.**AMENDMENTS TO THE CONSTITUTION.****ARTICLE I.**

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

ARTICLE II.

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

ARTICLE III.

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

ARTICLE IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due

process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

ARTICLE VII.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

ARTICLE VIII.

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

ARTICLE X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

ARTICLE XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States

by Citizens of another State, or by Citizens or Subjects of any Foreign State.

ARTICLE XII.

The Electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballot the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the President of the Senate.—The President of the Senate shall, in presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number

of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ARTICLE XIII.

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have the power to enforce this article by appropriate legislation.

ARTICLE XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United

States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

ARTICLE XV.

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.

Appendix No. 15.

In the discussion of the subject of treason to a State, the author referred to the cases of the United States v. Bollman and People v. Lynch, and said, "These were believed to be the only cases where the question had been presented to the Supreme Court of a State" (p. 1231). The author has since found the case of *Ex parte Quarrier*,¹ where it was held by the supreme court of West

¹ 2 West Va. 569-572.

Virginia that treason could be committed against both the United States and a State at the same time, by the same party and each offense would constitute a crime against the respective sovereignties.

The Court also held that treason against a State could only be committed by a citizen of the State. The language of the Court was: "To constitute Treason against the State, it is not enough to wage war against the United States generally or collectively, or as component parts of the national Union, but it must be done directly against the State, in particular, by invading her territory, attacking her citizens, subverting her government and laws, or attempting her destruction by force, etc., and that too by a citizen of the State; for none but her citizens owe her allegiance, and are, therefore, bound by that allegiance to protect and defend her against all assaults of her enemies. Others may be enemies, but the citizen *only* may be enemy and traitor also, and the latter no less because he is the former."

Reference to the famous case of *Virginia v. Brown* was also omitted. Probably because this case is so intimately connected with the political history of the United States, beginning about 1859, and because it is not judicially reported, it is usually not regarded as an authority on the subject of treason against a State, but nevertheless it is.

John Brown and a number of others in the year 1859, at Harpers Ferry in the State of Virginia, took possession of the arsenal and arms belonging to the United States. From there they sent out persons who arrested various citizens of Virginia and confined them in the arsenal, from which place they fired upon, wounded and killed other citizens of Virginia. The State and Federal authorities were each called upon for assistance and each sent a military force to overcome and capture Brown and his followers, which they did.

Brown could probably have been tried for treason, either against the United States or the State of Virginia, but the Federal government did not insist upon its right to prosecute him, but left him to be dealt with by the State. He was indicted by the State for treason against it and was tried and executed.

INDEX

References are to pages.

ABOLISHMENT OF THE ELECTORAL COLLEGE—

- proposed by Jefferson, 1579 n.
- introduction of bill for, by Sumner, 1579 n.

ABOLISHMENT OF SLAVERY—

- by President Lincoln's Emancipation Proclamation, 913 n.
- by the Thirteenth Amendment, 1582-1593.

ABRIDGMENT—

- Senator Howard on, in Fourteenth Amendment, 1653 n.

ABUTTING PROPERTY ON STREETS—

- classification of, for taxation, 1647.

ABSENCES OF THE PRESIDENTS—

- from the capital, 1006, 1011 n.

ACCEPTANCE OF PRESENTS—

- from kings or princes by American officials. prohibited, 758-762 n.

ACCOUNTS OF PUBLIC EXPENDITURES—

- must be published, 756.

ACCUSED—

- entitled to know nature of accusation, 1481-1483.
- where to be tried, 1480, 1481.
- to be confronted with witnesses against him, 1483.
- to have copy of indictment against him, 1483.
- to have assistance of counsel, 1486.
- dying declarations, and depositions of deceased witnesses admissible against, under Sixth Amendment, 1484.

ACQUISITION OF NATIONAL TERRITORY—

- no express power in the Constitution authorizing, 1253.
- may be by resolution of Congress, 1254.
- may be by treaty, 1264.
- may be by purchase, 1264.
- may be by discovery, 1264.
- is an inherent power of government, 1264.
- Louisiana acquired by purchase, 1266.
- Adams, John Q. on purchase of Louisiana territory, 1269 n.

References are to pages.

ACQUISITION OF NATIONAL TERRITORY (continued)—

- Quincy, Josiah, on purchase of Louisiana territory, 1281 n.
- acquisitions from Mexico acquired by treaty, 1273.
- Webster on extending the Constitution to acquired territory, 1273.
- acquisition of Philippine Islands and Porto Rico by treaty, 1276.
- acquisition of Alaska by purchase, 1252.
- when Congress can legislate for newly acquired territory, 1280.
- the Constitution applies to territory incorporated into the United States, 1280.
- Constitution does not apply to territory annexed, but not incorporated into the Union, 1280.
- the Fifth, Sixth and Seventh Amendments extend to territory which is part of the United States, 1280.
- when the government of the United States extends to acquired territory, 1280, 1281.
- when acquired territory is controlled by the President under his military power, 1281, 1282.
- new territory may be held by the United States until its inhabitants are qualified for citizenship, 1282.
- Congress can determine the time territory can be held, until admitted into the Union, 1282.

ACT OF SETTLEMENT—

- In England, 1076 n.

ACT OF 1864, AMENDMENT OF, PROVIDING FOR A TAX.

- Supreme Court declined to pass on authenticity of, 352.

ACTS OF REVENUE—

- what are, 351.

ACTS OF CONGRESS—

- when judiciary will consider them, 297, 298.
- orders and resolutions of Congress considered, 377-380.

ADAMS, ANDREW—

- signed Articles of Confederation, 1697.

ADAMS, CHARLES FRANCIS—

- on independence of Secretary of Treasury, 925 n.

ADAMS, JOHN—

- member of First Colonial Congress, 1.
- described first opening of Congress with prayer, 5 n.
- member of committee on address to the King, 9.
- member of committee to prepare Declaration of Independence, 13 n, 15 n.
- describes why Jefferson wrote the Declaration of Independence, 14 n.

References are to pages.

ADAMS, JOHN (continued)—

comments of, on eloquence and fame, 14 n.
 disapproved remarks in the Declaration about the King, 15 n.
 Pinckney's draft of Constitution sent to, 68.
 on relations of President and Senate, 227 n, 231, 969.
 opposed States instructing their representatives, 237 n.
 vetoed no bills as President, 376.
 President of Senate, 853 n.
 urged Senate to choose title for President, 853 n.
 reproof of Senator Izard by, 853 n.
 defended Presidency against charge of monarchism, 864 n.
 on legislative corruption, 864 n.
 on danger of senatorial executive power, 864 n.
 on method of electing the President, 887 n.
 declared office of Secretary of the Treasury a rival office of President, 925 n.
 criticised by Jefferson, 928 n.
 gives casting vote against Senate passing on removals from office by the President, 978 n.
 absences from capital while President, 1010 n.
 member of Committee on Judiciary in First Continental Congress, 1040 n.
 member of new Committee on Appeals, 1043.
 elected Vice-President, 1568.
 elected President, 1569.
 on origin of "caucus," 1575, 1579.

ADAMS, JOHN QUINCY—

resigned as United States Senator, 235.
 vetoed no bills as President, 376.
 favored internal improvements, 645, 646.
 Pinckney's letter to, concerning the executive, 854.
 on war power of President, 913.
 absences from capital while President, 1011 n.
 on abuses of veto power, 1035.
 on Louisiana purchase and implied powers, 1268 n.
 on election of President by House of Representatives, 1565, 1566.

ADAMS, SAMUEL—

member of First Colonial Congress, 1.
 moved that "Mr. Duché read prayers to Congress," 5 n.
 described by Galloway, 11 n.
 member of Committee on Articles of Confederation, 23, 1047.
 member of Second Colonial Congress, 26.
 attends the caucus, 1574 n.
 signed Articles of Confederation, 1697.

References are to pages.

ADAMS, THOMAS—

signed Articles of Confederation, 1698.

ADDISON, JUDGE—

impeachment of, 219, 1037.

ADDRESS TO THE PEOPLE OF GREAT BRITAIN—

by the First Colonial Congress, 6-8.

written by Lee, 9 n.

rewritten by Jay, 8 n.

ADDRESS TO THE KING—

by the First Colonial Congress, 6-9.

ADDRESS TO THE INHABITANTS OF THE COLONIES—

by the First Colonial Congress, 9.

ADDYSTON PIPE & STEEL CO. v. UNITED STATES, 587.

ADJOURNMENT OF CONGRESS—

under Articles of Confederation, 30, 300.

when either house forbidden to adjourn for longer time than three days, 298-300.

as affecting bills sent to President, 365, 370.

ADMIRALTY COURTS—

how named, 1102.

jurisdiction of, 1102, 1103.

ADMISSION OF NEW STATES TO UNION, 1245, 1255.

ADVERTISEMENTS ON NATIONAL FLAG—

prohibited, 543.

AFFIRMATION OR OATH—

of Senators sitting in impeachment trial, 262.

of President, 907-910.

of Senators and Representatives, State legislators and officers of the United States, 1332, 1334.

AFRICAN SLAVE TRADE IN THE UNITED STATES—

could not be prohibited by Congress, prior to, 1808, 715, 720.

see SLAVE TRADE. CHARLES PINCKNEY.

AGE—

of Representatives, 141, 143.

of Senators, 246, 247.

Henry Clay under age when appointed Senator, 247 n.

of President, 889, 890.

References are to pages.

AGREEMENTS BETWEEN STATES AND FOREIGN POWERS—

defined and forbidden, 845, 846.

AID AND COMFORT TO THE ENEMY—

giving, is treason, 1150.

definition of, 1151.

ALASKA—

acquired by treaty, 961, 963, 1252.

ALFRED, KING, 1141.

ALIENS—

protection of, 150, 151.

children of, become citizens, when, 150.

naturalization of, 612, 624, 1600 n.

exclusion of, 622.

protected by Fourth Amendment, 1429.

deportation of, 1457.

ALIEN AND SEDITION LAWS, 1177.

ALLEGIANCE—

see OATH OF ALLEGIANCE.

ALLIANCE—

definition of, 763.

States prohibited from making, 763.

under Articles of Confederation, 28.

see TREATIES.

ALVEY, CHIEF JUSTICE—

on witnesses before Congress, 287.

on arrest on suspicion, 1427.

AMBASSADORS—

under Articles of Confederation, 28.

privileged from process of the courts, 319.

Jefferson suggested gifts for departing, 761 n.

how appointed, 967, 972.

President to receive foreign, 1003.

Story and Marshall on, 1098.

definition of, 1099, 1100.

Bayard, the first Ambassador from the United States, 1099.

AMENDMENTS TO THE CONSTITUTION (see AMENDMENTS IN NUMERICAL ORDER).

how proposed, 1301.

debates in Constitutional Convention concerning, 1303-1307.

References are to pages.

AMENDMENTS TO THE CONSTITUTION (continued)—

Iredell, Justice, on, 1308 n.
 all have been proposed by Congress, 1310.
 ratification of, 1310.
 no time limit for ratification of, 1311.
 importance of the amending power, explained by Madison, 1312.
 State Legislature cannot recall its ratification of, 1313.
 views of Hamilton on, 1315.
 views of Madison on, 1317.
 views of Marshall on, 1318, 1369 n.
 President not required to approve, 1318.
 history of first ten, 1351-1370.
 number submitted and ratified, 1351.
 Harlan, Justice, on the Amendments and a Bill of Rights, 1351 n.
 Bill of Rights in original, 1362, 1363.
 States which proposed, 1363.
 original proposed by Madison, 1363, 1364.
 approval of three-fourths of States necessary to secure, 1303, 1369.
 Fisher Ames against Madison's amendments, 1364 n, 1368 n.
 Sherman secured passage of, as separate articles, 1365, 1365 n, 1369 n.
 Mason on omission of, 1347.
 dates of ratification of, 1368.
 Richard Henry Lee on, 1369 n.
 embodied in State Constitutions, 1452.
 Van Buren on Madison's work for the amendments, 1530.
 Bryce on omission of in the Constitution, 1531 n, 1533 n.
 first ten, limitations on power of general government, 1531-1535.
 why first ten were adopted, Marshall on, 1533, 1534, 1535.

AMERICAN FEDERATION OF LABOR CASE—

Loewe v. Lawler, 594.

AMERICAN SHIPPING—

debate on in constitutional convention, 464, 466.

AMERICAN SUGAR REFINING COMPANY CASE—

United States v. Knight & Co., 583.

AMES, ADALBERT—

refused admission to Senate, 249.

AMES, FISHER—

on assessing a tax on carriages, 179.
 member of Committee to Report a Title for the President, 851.
 against Madison's amendments, 1364 n, 1368 n.

References are to pages.

AMES, HERMAN V.—

work on amendments, 610, 1268, 1302, 1303, 1363, 1375, 1556, 1558, 1675, 1679.

AMNESTY—

power of President to grant, 946, 947.
by whom may be exercised, 946.
definition of, 946.
President Johnson's proclamation of, 946, 947.
Rhode Island's Act of, 1229 n.

"AMONG"—

Marshall's definition of, in relation to commerce, 472.

AMPHICTYONIC COUNCIL, 1729.

ANARCHISTS—

barred from United States, 623, 624.
cannot be naturalized, 1600 n.
Fuller, Chief Justice, on, 1404.
defined by Congress, 1600 n.

ANDREWS, JUDGE—

on impeachment, 214.

ANDREWS, ISRAEL W.—

on absence of members from Colonial Congress, 31, 32.
on compensation of Congressmen, 305.
on coinage and weights, 634, 640.
on piracy, 671.
on land cessions, 1259.
on express powers, 1527.
on Tenth Amendment, 1526, 1527.

ANNAPOLIS CONFERENCE—

held at request of Virginia, 39.
five States represented in, 42.
conference suggested Constitutional Convention, 43.
Monroe's account of, 43, 44 n.
Madison on, 80.

ANNE, QUEEN—

concerning veto power, 355, 362 n.

ANNEXATION—

of Texas, 1253-1255.
of Alaska, 1253.

References are to pages.

ANNEXATION (continued)—

- of Louisiana Territory, 1268.
- of Philippine Islands, 1253.
- of Mexican territory, 1271, 1273.
- methods of, 1253, 1264.

ANNUAL ELECTION TO CONGRESS—

- under the Articles of Confederation, 126.
- favored by the New England delegates in the Convention, 126, 128.

ANNULMENT OF LAWS—

- by the courts, 1168, 1192.
- by State courts before the Constitutional Convention, 1169, 1170.
- judges impeached for, 1170.
- Randolph proposed council of revision for, 1171, 1172.
- Randolph's plan rejected by the Convention, 1174.
- debated in State Conventions, 1174.
- views of Ellsworth, Marshall, Pinckney, Wilson, Martin and Hamilton, on, 1176.
- considered in State Legislatures, 1177.
- views of Jackson and McKean on, 1178 n, 1179 n.
- Marshall Chief Justice on the, 1178.
- Marshall changes his views concerning, 1181.
- Justices Story and Gibson on, 1183.
- Wayne, Justice, on, 1184.
- Taney, Chief Justice, on, 1185, 1187.
- Chase, Chief Justice, on, 1187.
- Harlan, Justice, on, 1187.
- Webster on, 1190.
- White, Justice, on, 1191.
- few Acts of Congress annulled, 1192.

ARMS—

- definition of, 1410.
- right to bear, 1411.

ARMY—

- under Articles of Confederation, 28, 29, 684, 687.
- power of President over, 689.
- power of Congress to abolish, 689, 914.
- President Commander in Chief of, 911, 918, 919.
- war power of President, 913, 914.
- regulations for control of, 915.
- President does not take active command of, 918, 919.

References are to pages.

ARMY OFFICERS—

not impeachable, 1031.

"ARRIVAL"—

definition of in Wilson Act, 488.

ARTICLES OF CONFEDERATION—

Committee of Congress to prepare, 23.

Committee reported, 23.

adoption of, 23.

Congress sends letter concerning, to the States, 23, 24.
ratified by States, 25.

first meeting of Congress under, 25.

power of States under, 27, 35.

States forbidden to make war or treaties under, 28.

power of Congress under, 29.

nature of the union, under, 30.

weakness of, 32-37.

Washington deplored weakness of Congress under, 32.

decline of the Confederation under, 38.

Congress votes for a convention to revise, 45, 46.

no provision for impeachment under, 207.

long sessions of Congress under, 279.

Congressmen paid by States under, 301.

freedom of speech in Congress under, 325.

no veto power under, 356.

power of taxation left to States under, 385.

power to raise armies retained by States under, 684.

titles of nobility forbidden by, 758.

no executive department under, 850.

treaty power under, 948, 950.

courts under, 1048, 1049.

treason not defined under, 1146.

rights of citizens in other States guaranteed under, 1208, 1210, 1212.

fugitives from justice under, 1223.

new States not provided for under, 1253.

provisions for amendments under, 1303, 1305.

ARTICLES OF IMPEACHMENT—

cannot be amended by the managers of the House, 215.

may be amended by the House, 215.

ASH—

definition of bankrupt by, 629, 630.

ASHLEY, LORD—

speech of, on treason, 1487, 1488 n.

References are to pages.

ASHLEY, JAMES M.—

introduced bill in House of Representatives to abolish slavery,
1582, 1584.

ASHBURTON-WEBSTER TREATY—

concerning Canadian boundary, 617.

ASSEMBLY—

Hamilton's proposed name for the House of Representatives, 125.

ATTAINDER—

bills of, prohibited, 733.

Madison on, 734.

definition of, 735-738.

Jefferson's bill of, 735, 736.

Miller on, 738.

attainder for treason prohibited, 1155.

ATTENDANCE ON CONGRESS, 281, 284, 288.

B.

BABCOCK, ORVILLE E.—

President Grant testified in trial of, 1025 n.

BACON, LORD—

on abridgment, 1477.

BACON, A. O., SENATOR—

on President as Commander in Chief, 913 n.

on right of Senate to call for official papers, 967.

BAGEHOT, WALTER—

on the King signing his own death warrant, 355.

BAIL—

excessive, prohibited, 1505-1509.

English origin of, 1505 n.

rule for determining what is excessive, 1508.

BAKERIES—

State control over, 607-608.

BALDWIN, ABRAHAM—

delegate to Constitutional Convention, 59.

member of Committee of Eleven, 76, 233 n.

on Morris' plan for a national bank, 572, 573 n.

References are to pages.

- BALDWIN, ABRAHAM** (continued)—
 on power of the President, 856 n.
 member of Grand Committee on assumption of State debts, 1323 n.
 signed Constitution, 1350, 1771.
 member of Committee to prepare amendments, 1365 n.
- BALDWIN, JUSTICE**—
 on controversies between States, 1111.
 on a Bill of Rights, 1532.
- BALTIMORE, LORD**—
 granted charter for Maryland, 1004.
- BANCROFT, GEORGE**—
 on plans for the Constitutional Convention, 49, 51.
 on Randolph's speech on opening the Constitutional Convention, 60.
 sketch of Monroe by, 457 n.
- BANK, NATIONAL**—
 favored by Hamilton and Robert Morris, 573.
 chartered as Bank of the United States, 576.
- BANK OF NORTH AMERICA**—
 chartered, 576.
 charter cancelled, 778.
- BANK TAXES**—
 Marshall, Chief Justice, on, 399-402.
 Chase, Chief Justice, on, 184.
- BANK OF UNITED STATES**—
 Jefferson on, 390.
 taxed by Ohio, 402.
- BANKRUPT, NOTES OF**—
 defined, 628-630.
 discussed, *Sturges v. Crowninshield*, 783.
 discussed, *M'Millan v. M'Neill*, 784.
- BANKRUPTCY**—
 uniform laws on, 624, 633.
 history of, 624.
 Roman law on, 625.
 English law on, 626-628.
 capital punishment of bankrupt abolished, 627.
 word "bankrupt," 628-630.
 bankruptcy under Articles of Confederation, 628.
 definition of bankruptcy, 628.
 clause attributed to Charles Pinckney, 630.
 Acts of Congress concerning, 631, 632.

References are to pages.

BANKRUPTCY (continued)—

State laws concerning, 632.
certain debts not dischargeable in, 632.

BANKS—

opposition to in Constitutional Convention, 573 n.
Marshall on Power of Congress to establish, 573.

BANKS, NATHANIEL P.—

Speaker of the House of Representatives, 205.
on right of House to participate in making treaties, 961.

BARBOUR, PHILIP R.—

Speaker House of Representatives, 205.
Justice of Supreme Court, 810 n, 811 n.

BARNARD, JUDGE—

impeachment of, 214, 216.

BARRY, WILLIAM T.—

Postmaster General, 933.

BARTLETT, JOSIAH—

member of committee to prepare Articles of Confederation, 23,
1047.
signed Articles of Confederation, 1697.

BASSETT, RICHARD—

delegate to Constitutional Convention, 58, 59.
member of first Senate, 225.
opposed Senate passing on removals from office by President, 978 n.
signed the Constitution, 1347, 1770.

BATES, EDWARD, ATTORNEY-GENERAL—

on the suspension of the writ of habeas corpus by President Lincoln, 725.
on admission of West Virginia to the union, 1251.

BATTLE—

trial by, 1137.

BAXTER, JUDGE—

on post roads, 649.

BAYARD, THOMAS F.—

first Ambassador from United States to England, 1099.

BEARING OF ARMS—

right to bear, not to be infringed, 1408.
arms defined, 1410.

References are to pages.

BEDFORD, GUNNING—

delegate to Constitutional Convention, 58.
member of Committee of Eleven, 76, 233 n.
on law making power, 120.
favored three year term for President, 868.
signed Constitution, 1347, 1770.

BEEF TRUST—

suit against, 590.

BEHAVIOUR, GOOD—

defined, 1072-1074.

BELKNAP, WILLIAM W., SECRETARY OF WAR—

impeachment trial of, 211, 215, 216, 1031, 1032.

BELL, JOHN—

Speaker of House of Representatives, 205.

BENJAMIN, JUDAH P.—

expelled from Senate, 1159 n.

BENSON, EGBERT—

member of Committee on Title for President, 851 n, 852 n.
member of Committee on Amendments, 1365 n.

BENTON, J. H.—

on the veto power, 374 n.

BERKLEY, WILLIAM—

denounced freedom of the press, 1400.

BERMUDAS—

provision in Franklin's plan for a Constitution, for their admission
to the United States, 22, 1687.

BEST, JUSTICE—

on freedom of the press, 1402.

BEVERIDGE, ALBERT J.—

on regulation of commerce, 477 n, 478.

BIBLICAL ORIGIN OF JURY, 1142.

BIBLE—

in public schools discussed, 1389-1396.
President Grant on teaching sectarian tenets, 1398 n.
Blaine's proposed amendment to Constitution on an establishment
of religion, 1398 n.

References are to pages.

BIDD, GEORGE—

attorney in Blair v. Williams, 795 n.

BIDDLE, EDWARD—

member of first Colonial Congress, 2.

BIENNIAL ELECTIONS—

for members of House of Representatives, 125-130.

changed from annual elections on Randolph's motion, 127, 129.

BIGELOW, CHIEF JUSTICE—

on the Bible in the public schools, 1392.

BIGELOW, MELVILLE M.—

on use of the term "Commerce," 461 n.

BILL BOARDS, 601 (see POLICE POWER).

BILLS OF ATTAINDER—

prohibited, 733.

Madison on, 734.

definition of, 735-738.

Jefferson's bill of, 735, 736.

Miller, Justice, on, 738.

for treason prohibited, 1156.

BILLS IN CONGRESS—

regularity of presumed, 297.

subject to veto, 353.

become laws if not vetoed, 353, 368.

sent to President for his approval, 362, 371.

how approved, 363, 369.

action on when returned to Congress, 364, 366.

Madison's views on bills presented to the President, 364 n.

vote required to pass, 359, 362, 366, 377.

effect of expiration of Congress on bills signed by the President, 369.

effect of adjournment of Congress on, 365, 370.

veto of, whether a legislative or executive act, 371.

BILLS OF CREDIT (see LEGAL TENDER).

States forbidden to issue, 764, 772.

in the colonies, 765.

Madison on, 765.

Marshall on, 766.

Story on, 767 n.

definition of, 766, 774.

Mathews, Justice, on, 769.

References are to pages.

BILL OF RIGHTS—

- demanding by people when ratifying Constitution, 1351.
- embodied in first ten amendments, 1351, 1356.
- Harlan, Justice, on a, 1351 n.
- Patrick Henry demanded a, 1352 n.
- Constitutional Convention rejected a, 1352.
- Wilson gave reasons for omission of a, by the Constitution, 1354.
- Hamilton on rejection of a, 1354-1357.
- Madison on a, 1357-1360.
- Jefferson on a, 1360.
- demanding by States, 1362, 1363.
- objects of, in American Constitutions, 1452.

BILLINGS, JUDGE—

- on sufficiency of evidence, 1425.

BILLS FOR REVENUE—

- what are, 351.
- what are not, 351, 352.

BINGHAM, JOHN A.—

- on the Fifteenth Amendment, 1671.

BLACK, HENRY C.—

- on term of Vice-President when acting President, 898.
- on courts of admiralty, 1102.
- on annulment of laws, 1169.

BLACKSTONE, SIR WILLIAM—

- influence of on the framers of the Constitution, 77, 1139.
- on privilege of House of Commons, 306, 307.
- on forfeiture, 309.
- on police power, 599.
- on bankruptcy, 624, 625, 628, 629.
- on copyright, 658.
- on felony, 671.
- on habeas corpus, 722.
- on ex post facto laws, 741, 776.
- on crime, 1034, 1139, 1140.
- on tenure of judges, 1070.
- on treason, 1145, 1146, 1154, 1155, 1157.
- on crown warrants, 1415.

BLAINE, JAMES G.—

- Speaker of House of Representatives, 205.
- on treaty making power of the House of Representatives, 962, 963.
- proposed amendment to the Constitution concerning religion, 1398 n.

References are to pages.

BLAIR, HENRY—

first negro to secure a patent, 662 n.

BLAIR, JUSTICE—

on authority of delegates to first Colonial Congress, 2, 3.
delegate to Constitutional Convention, 63.
appointed to Supreme Court, 63, 1055 n.
signed Constitution, 1347, 1770.

BLAND, RICHARD—

in first Colonial Congress, 2.

BLATCHFORD, JUSTICE—

on the powers of Congress, 707.
on State inspection laws, 839, 840.
on contempt of court, and power of court to fine, 942.
on power of federal courts, 1084-1086.
on overt act of treason, 1152.
on cruel punishment, 1515, 1516.

BLEDSON, SENATOR—

resignation of, 245.

"BLESSINGS OF LIBERTY"—

clause in Preamble, 104.

BLOUNT, WILLIAM—

delegate to Constitutional Convention, 61.
impeachment of, 211, 220, 289.
signed the Constitution, 1348, 1771.

BLOW, HENRY T.—

member of Reconstruction Committee, 1598.

BOLINGBROKE, LORD, 142.

BONDS—

tax on, 191, 192.

BORROWING POWER OF CONGRESS—

under Articles of Confederation, 410.
debated in Constitutional Convention, 410-414.
not limited, 415.
tested by the Civil War, 415, 416.
in time of peace, 448-451.
cannot be burdened by States, 452.

BOSTON—

blocking port of, a grievance to the colonies, 3, 4, 22.
Boston Port Bill mentioned in Declaration of Rights, 1680.

References are to pages.

BOTKIN, JUDGE—

impeachment of, 1037 n.

BOUDINOT, ELIAS—

President of second Colonial Congress, 206.

member of committee to prepare amendments, 1365 n.

BOUNTIES—

for enlistment in Union Army sustained, 1657.

BOUTWELL, GEORGE S.—

member of Reconstruction Committee, 1598.

his part in the Fifteenth Amendment, 1668, 1671.

BOWDOIN, JAMES, GOVERNOR—

urged federal laws concerning trade, 38.

BOYCOTT OF BRITISH GOODS—

by first Colonial Congress, 7.

BOYD, LINN—

Speaker of the House of Representatives, 205.

BOYLE, CHIEF JUSTICE—

criticised Marshall's views on contracts, 784 n.

opinion in Kentucky bank note case, 795.

BRACON—

on jury trial, 1141.

BRADLEY, JUSTICE—

opinion of, in legal tender cases, 442-444, 447, 448.

on city ordinances, 454 n.

on commerce by water, 480.

on wharves, 501.

on goods in transit, 450.

on States excluding foreign products, 547.

on religion and unlawful beliefs, 1388.

on personal liberty and Fourteenth Amendment, 1417, 1422.

on what is probable cause, 1425.

on suits against States and Eleventh Amendment, 1541.

on effect of Thirteenth Amendment, 1586.

on State taxation, 1639.

on State courts and Fourteenth Amendment, 1642.

on when Congress can enforce the Fourteenth Amendment, 1642.

on when Congress cannot enforce Fourteenth Amendment, 1663.

BRANNON, JUDGE—

on the rights of citizens of other States, 1214.

References are to pages.

BRANNON, JUDGE (continued)—

on the Fourteenth Amendment, 1605.

on liberty, 1626.

BRAGG, THOMAS—

expelled from Senate, 289.

BREACH OF PRIVILEGE—

of members of Congress, 306.

BREACH OF PEACE—

defined, 309.

BREARLEY, DAVID—

delegate to Constitutional Convention, 59, 60.

favored equal representation of States, 164, 165.

chairman of Committee of Eleven, 349, 383, 463, 661.

Commissioner on Pennsylvania-Connecticut dispute, 1049.

BRECKENRIDGE, JOHN—

Jefferson's letter to, 1267.

BREWER, JUSTICE—

on House rules, 285.

on power of Congress over commerce, 497.

on telegraph companies, 507.

on original packages, 514.

on duties of Interstate Commerce Commission, 537.

on monopolies, 575.

on post roads, 650, 652.

on territorial government, 1261.

on just compensation for property, 1469.

on cruel punishment, 1519.

on Tenth Amendment, 1529.

on when is a State interested in a suit, 1548.

on enforcement of Thirteenth Amendment, 1590, 1593.

on hours for female labor, 1629.

BRIBERY—

cause for impeachment, 1027.

definition of, 1033.

BRIDGES—

control of Congress over, 500.

State control over railway bridges, 604, 605.

Charles River Bridge franchise, 807, 814.

BRIG WILSON, THE—

Marshall's first decision on commerce in, 496.

References are to pages.

BRISTOL, EARL OF—

impeachment of, 1022.

BRITISH TROOPS—

invited to become American citizens, 1207.

BROWN, JUSTICE—

on original packages, 512, 515.

on stopping of trains, 558, 559.

on police power, 602.

on Walla Walla waterworks franchise, 806.

on full faith and credit, 1193.

on Constitution, when applicable to territories, 1275, 1278.

on Hawaiian criminal law, 1443.

on purpose of Fifth Amendment, 1447.

on the Thirteenth Amendment, 1588.

on denial of rights to the colored race, 1634.

BROWN, JUDGE—

on coast defenses, 1467.

BROWN, JOHN—

trial of, for treason, 1779.

BROOKS, PRESTON—

assault on Charles Sumner by, 293.

BROOM, JACOB—

delegate to Constitutional Convention, 58, 59.

signed Constitution, 1347.

BROUGHAM, LORD—

on age of Representatives in Congress, 143 n.

BUCHANAN, JAMES—

vetoed by, as President, 376.

cabinet of, 929 n.

absences from capital while President, 1011.

approved proposed amendment to the Constitution, 1319.

BUCKALEW, CHARLES R., SENATOR—

proposed limit of time in which States should ratify Fourteenth Amendment, 1311.

BUCKINGHAM, DUKE OF—

impeachment of, 222 n.

BUCKNER, JOHN—

arrested for publishing laws of Virginia, 1400.

References are to pages.

BURDEN OF PROOF—

in impeachment trials, 214.

BURGESS, JOHN W.—

on oath of President, 908.

on the cabinet, 934.

on arrest of the President, 1021.

on election of electors, 1568.

BURKE, ENEAS—

member of Colonial Committee to try appeals, 1043 n.

member of committee to draw amendments, 1365 n.

BURNSIDE, A. E., GENERAL—

ordered arrest of Vollandigham, 726.

BURR, AARON—

trial of, 1478, 1565, 1676.

suspension of writ of habeas corpus during trial of, by Wilkinson, 731.

Congress declined to suspend writ of during trial of, 732, 733.

Jefferson's message on Burr's conspiracy, 732 n.

Marshall subpoenaed Jefferson as witness in trial of, 1013, 1017.

Jefferson's objection to subpoena, 1014-1017.

BURTON, JOSEPH R., SENATOR—

trial of, 269, 307, 308, 341.

BUTLER, BENJAMIN F.—

claimed privilege of Representative, 317.

manager of impeachment trial of President Johnson, 931 n.

BUTLER, GOVERNOR—

impeachment of, 216.

BUTLER, PIERCE—

delegate to the Constitutional Convention, 62, 63.

favoured general suffrage for Representatives, 134.

member of first Senate, 225.

opposed paper money, 411, 413.

on power to declare war, 677, 678.

favoured return of fugitive slaves, 1241, 1242.

signed Constitution, 1349.

on the first ten amendments, 1368 n.

BRYCE, JAMES—

on United States Senators, 226 n.

on sources of the Constitution, 77-78-79 n.

References are to pages.

BRYCE, JAMES (continued)—

- on veto power in England, 355 n.
- on Lincoln as a dictator, 930 n.
- on treason against a State, 1226 n.
- on omission of a bill of rights in the Constitution, 1531, 1533.
- on aliens voting, 1616 n.

C.

CABELL, JOSEPH C.—

- Jefferson's letter to, on qualifications of members of Congress, 158-160.

CABINET—

- order of, in succession to Presidency, 896, 897.
- relations and duties of members of, 923.
- Pinckney predicted a cabinet, 924.
- departments of government, established, 925 n.
- when term "Cabinet" first used, 925 n.
- origin of, 926.
- not contemplated by the Constitutional Convention, 925.
- not provided for by Constitution, 926, 927.
- Washington's cabinet meetings, 927, 927 n.
- Jefferson's cabinet meetings, 928 n.
- President Hayes on President and Cabinet, 929, 930 n.
- days for meeting of, 931.
- Curtis on the, 932 n.
- President Jackson makes Postmaster General a member of, 933.
- President may require opinions of, in writing, 923, 934.
- Madison, on the, 934-936 n.

CADWINE, 1141.

CAESAR, JULIUS, 468.

CALHOUN, JOHN C.—

- on the Preamble, 93.
- called the veto power "the deity of our political system," 361.
- on legislative power of Congress, 709.
- avored a plural executive, 857-859.
- on power to remove from office, and spoils system, 978-980.
- maintained Constitution went into new territory by its own strength, 1272.
- on guarantee of republican form of government, 1291.
- on citizenship in State and United States, 1614, 1615 n.
- on equality in Declaration of Independence and Ordinance of 1787, 1632, 1633 n.

References are to pages.

CAMDEN, LORD—

his declaration for personal liberty, 1419, 1423.

CAMERON, SIMON—

election contest of, 237, 238.

CAMPBELL—

on testimony of the King, 1021.

CAMPBELL, JUDGE—

on cruel punishments, 1510.

CANADA—

included in Franklin's plan of union, 22, 1687.

extradition of fugitives from, 1233 n.

admission of to the Union, under the Articles of Confederation, 30, 1246.

CANAL ZONE—

charters in, 575.

CANALS—

advocated by Wilson in Constitutional Convention, 572.

bill for construction of vetoed by Madison, 644.

right of Congress to build, 648.

national control over favored by John Q. Adams, 645.

CANNON, JOSEPH G.—

Speaker of the House of Representatives, 206.

CAPITAL CRIME—

defined, 1435.

CAPITATION TAXES—

Sedgwick on, 177.

Dexter on, 178.

Chief Justice Fuller on, 192.

Hamilton on, 747.

defined, 747.

CAPTURES—

Congress can make laws governing, 683.

CARLISLE, JOHN G.—

Speaker of the House of Representatives, 206.

CARNARVEN, LORD—

speech by, 222, 222 n.

References are to pages.

CARRIAGE TAX—

levied by Congress, case of *Hylton v. United States*, 179, 183, 193, 196.

CARROLL, CHARLES—

member of first Senate, 225.

member of Committee on title for President, 851.

opposed Senate passing on removals from office, 978.

CARROLL, DANIEL—

delegate to Constitutional Convention, 60.

on money bills, 348.

on quorum clause, 359.

signed Constitution, 1347, 1771.

opposed establishment of religious freedom by law, 1372.

signed Articles of Confederation, 1698.

CASE—

definition of a, 1088.

includes criminal cases, 1103.

Choate on Cases and Controversies, 1104, 1106 n.

CASES TO WHICH THE JUDICIAL POWER EXTENDS—

to all cases arising under the Constitution, 1093.

to all cases arising under the laws of the United States, 1094.

to all cases arising under treaties, 1096.

to all cases affecting ambassadors, other public ministers and consuls, 1097.

to all cases of admiralty and maritime jurisdiction, 1101.

CASWELL, RICHARD—

refused to serve in Constitutional Convention, 64.

CATRON, JUSTICE—

on extradition, 1237.

on establishment of religion, 1383.

CAUCUS—

origin of, 1573, 1574 n.

party caucus assumed national importance under John Adams, 1573.
of Jefferson's friends, 1573.

John Adams on the Boston Caucus Club and the calkers, 1574 n.

Presidential candidates nominated in, 1575.

decline of the caucus system, 1575.

CESSION OF LANDS—

by States to the United States, 1256-1258.

References are to pages.

CHAIRMEN OF COMMITTEES—

in the House of Representatives, how appointed, 204.

CHALLENGE—

no challenge of Senators in impeachment trials, 217-220.

of jurymen, 1143.

Chase, Chief Justice, on, 1477.

Marshall, Chief Justice on, in Burr trial, 1478.

history of challenge of jurors in England, 1498.

of grand jurymen in capital cases, 1637.

CHAPLAIN—

how chosen in House of Representatives, 203,

Madison on salary of, 203 n.

how chosen in Senate, 255.

CHARLES I.—

Patrick Henry on, 1352 n.

CHARLES II.—

granted charter to Rhode Island, 1229.

CHARTERS TO COLONIES—

Massachusetts Bay, 1003.

Maryland, 1004.

Virginia, 1206.

Rhode Island, 1229.

Connecticut, 1352 n.

CHARTERS TO CORPORATIONS—

power of Congress to grant, 576, 577.

power to change charters, 819, 820.

CHASE, CHIEF JUSTICE—

on bank taxes, 184.

letter to, from Chief Justice Taney on taxation of official salaries, 198.

presided at the impeachment trial of President Johnson, 221, 263.

on privileges of Congressmen, 317, 318.

on legal tender, 415-435.

on ex post facto laws, 739-742.

on obligation of contracts, 830.

on the President and the army, 914.

on pardons by the President, 938.

on enjoining the President, 1020, 1023.

on cause for impeachment, 1035.

defined a "State," 1117.

References are to pages.

CHASE, CHIEF JUSTICE (continued)—

- on the annulment of laws, 1187, 1192.
- on loyalty to a State not a defense for treason, 1227.
- on ordinance of 1787, 1263.
- on the government of Louisiana Territory, 1268.
- on guaranty of Republican form of government, 1288.
- on challenge of jurors, 1477.
- presided at trial of Jefferson Davis for treason, 1563.

CHASE, JUSTICE—

- member of Colonial Congress, 2, 26 n.
- on the conduct of Congress during the revolution, 37.
- on duties and direct taxes, 180, 183, 184.
- impeachment of, 211.
- on ex post facto laws, 739-741.
- member of Standing Committee to hear appeals in cases of captures, 1043 n.
- on power of courts to annul laws, 1181.

CHATHAM, LORD—

- on the addresses of the first Colonial Congress, 10, 142.

CHEROKEE NATION—

- attempted to sue State of Georgia, 1110.
- extradition from denied, 1237.
- members of, not entitled to provisions of Fifth Amendment, 1434.

CHESTNUT, JAMES, JR.—

- expelled from Senate, 289.

CHEVES, LANGDON—

- Speaker of the House of Representatives, 205.

CHILDREN—

- labor products of, in relation to interstate commerce, 523, 532 n, 533 n.

CHILD, FRANCIS—

- prints Pinckney's plan of Constitution, 67 n, 69 n.

CHINA—

- shipment of corpse to, not commerce, 534.

CHINESE—

- barred from citizenship, 618.
- seizure of papers belonging to, 1429.
- certificate of admission of, to United States, effect of, 1458.
- cutting off cue of, cruel punishment, 1520-1522.

References are to pages.

CHINESE (continued)—

coolies, 1593.

laundries, regulation of, 1648.

CHOATE, RUFUS—

on commerce, 456, 485 n.

on tenure of judges and the Star Chamber, 1076, 1077 n.

on cases and controversies, 1104, 1106.

on the Declaration of Independence, 1633.

CHRISTIANITY—

in the United States, 1372.

not recognized in treaty with Tripoli, 1372 n.

CHURCH, JUDGE—

on impeachment, 214.

CHURCH AND STATE—

union of prohibited, 1338, 1338 n.

Congress prohibited from making any law respecting an establishment of religion, 1377.

four States demanded expression in the Constitution concerning religious freedom, 1375 n.

Jefferson drew Act to guarantee religious freedom in Virginia, 1377-1379.

Story on religious freedom, 1330.

separation of, 1381.

religious freedom in the United States, 1384-1386.

religion, definition of, 1387.

Bradley, Justice, on unlawful beliefs, 1388.

Cooley on church and state, 1396-1397.

Blaine's amendment respecting the establishment of a religion, 1398 n.

CINCINNATI, ORDER OF THE—

political influence of, feared, 879, 1562.

CIRCUIT COURT—

refused to award pensions, 115 n.

establishment of, 1054.

CITIES—

franchises in, 806, 819.

CITIZENS—

public and private rights of, 143, 144.

who are, of the United States, 147-152.

References are to pages.

CITIZENS (continued)—

- can sue citizens of other States, 1117.
- can sue in land grant cases, 1120.
- can sue foreign state, citizens or subjects, 1121.
- rights of, guaranteed in other States, 1205-1207.
- Pinckney author of clause concerning, 1205.
- privileges and immunities of, 1208.
- rights of, 1209-1211.
- corporations, when they are, 1219.

CITIZENSHIP—

- a qualification for representatives, 143, 144.
- in United States, 147-155.
- States can bestow only State, 621.
- residence and, 1118.
- under Articles of Confederation, 1207.
- offered to British troops, 1207 n.
- Pinckney on, 1209 n.
- of United States, 1211.
- rights of, guaranteed by Fourteenth Amendment, 1594.
- naturalization laws and, 1600 n.
- Miller on, 1609.
- of State and Nation, 1614-1616.
- Calhoun's views on, 1614 n.
- aliens and, 1615.
- Curtis and Hare on, 1617.
- Gray, Justice, on, 1618.

CIVIL RIGHTS BILL—

- enacted in 1876, 148, 149.
- opinions concerning, 1587.
- passed over President Johnson's veto, 1607.
- declared unconstitutional, 1590, 1661-1664.

CIVIL SUMMONS—

- served on Congressman, 314.

CLAIMS AGAINST UNITED STATES—

- what are, 405.

CLARK, JUDGE—

- on abolishment of Federal Courts, 1078 n.
- on annulment of laws, 1168.

CLARK, ABRAHAM—

- refused to serve as delegate to Constitutional Convention, 64.

References are to pages.

CLARK, A. J.—

- on power of Congress to regulate commerce, 487 n.
- on judicial power, 1088 n.

CLARKE, DANIEL—

- on the Fourteenth Amendment, 1604.

CLASSIFICATION OF SENATORS—

- controlled by rule of Senate, 242, 243.

CLASSIFICATION OF PROPERTY—

- for taxation, 1640-1649.

CLAY, HENRY—

- Speaker of the House of Representatives, 205, 206.

CLERGYMEN—

- amendment proposed to Constitution to exclude from holding office, 1338.

CLERKS OF SENATE AND HOUSE OF REPRESENTATIVES—

- nominated in caucus, 255, 203.

CLEVELAND, GROVER—

- vetoed by, as President, 376.
- removed a district attorney from office, 985.

CLIFFORD, JUSTICE—

- on indirect taxes, 186.
- on treaty power, 955.
- on rights of citizens in other States, 1217.

CLINGAN, WILLIAM—

- signed Articles of Confederation, 1698.

CLINGMAN, THOMAS L.—

- expelled from Senate, 289.

CLYMER, GEORGE—

- member of Second Colonial Congress, 18.
- signed Declaration of Independence, 64.
- delegate to Constitutional Convention, 62.
- member of Committee on Amendments, 1365 n.
- member of Grand Committee on Assumption of State Debts, 1323 n.
- signed the Constitution, 1347, 1770.

COBB, HOWELL—

- Speaker of the House of Representatives, 205.

COBBETT, WILLIAM—

- on declaration of rights, 1505, 1506 n.

References are to pages.

COCKRELL, FRANCIS N.—

on impeachment of Judge Swayne, 264.

COFFIN v. COFFIN, 326.

C. O. D. SHIPMENTS—

when interstate commerce, 549.

COHENS v. VIRGINIA, 1542.

COINAGE.

under Articles of Confederation, 29.

States could coin money under Articles, 634.

Congress has power to coin money, 634.

States forbidden to coin money under the Constitution, 763.

COKE, LORD—

on privilege of Commons, 307.

on law of the land, 1450.

on impartial jury, 1477.

COLFAX, SCHUYLER—

Speaker of the House of Representatives, 205.

COLLINS, JOHN—

signed Articles of Confederation, 1697.

COLONIAL CONGRESS, FIRST—

met in Philadelphia, 1, 2.

elected Peyton Randolph president, 1.

had no federal power, 2.

delegates to, instructed by the colonies, 3-5.

each colony had one vote in, 5-6, 163.

address by, to the people of Great Britain, 6, 7.

address by, to the King, 8.

address by, to the colonies, 9.

Chatham and Webster on addresses of, 10.

Galloway's plan of union presented to, 10.

Presidents of, 206.

COLONIAL CONGRESS, SECOND—

met in Philadelphia, 12.

established a post office department, 12.

issued an address to the King, and to the people of Great Britain,
12.

Virginia demanded independence in, 13.

Declaration of Independence adopted by, 13-20.

Franklin presents plan of union to, 21.

Articles of Confederation adopted by, 23-25.

References are to pages.

COLONIAL CONGRESS, SECOND (continued)—

- under the Articles of Confederation, 25.
- weakness of the Articles of Confederation, 33, 34, 36.
- conduct of, revolutionary, 37.
- recommended holding the Constitutional Convention, 45.
- Presidents of, 206, 207.
- treaties under the, 948-949.
- establishment of courts under the, 1039.
- passed resolution transmitting Constitution and Washington's letter to the States, 1344.
- received Constitution from Convention, 1344.

COLOR BLINDNESS—

- power of State to enact laws concerning, 544.

COLORED PASSENGERS—

- legislation affecting, 544, 563, 564.

COMBINATIONS (see TRUST LEGISLATION, 581).

- of insurance companies may be constitutional, 1630.

COMMANDER-IN-CHIEF OF ARMY AND NAVY—

- President as, 911-919.

COMMERCE—

- disputes concerning, led to Annapolis Conference, 38-43.
- relations of Alexandria conference to, 44.
- regulation of, considered, 453-570.
- Judson on, 453 n.
- Johnson, Justice, on, in *Gibbons v. Ogden*, 454.
- slow development of, 453 n.
- rapid development of later, 453.
- attitude of Supreme Court toward, 453 n.
- before Articles of Confederation, 454.
- after Articles of Confederation, 456.
- debate on, in the Constitutional Convention, 457-460.
- report on, by Committee of Detail, 459, 460.
- condition of, at the time of the Constitutional Convention, 461.
- unequal advantages of the States as to, 461, 462.
- debate in Convention on trade requirements of different States, 463-466.
- Pinckney on the five great commercial interests of the States, 463.
- defeat of Pinckney's motion, that the regulation of commerce require two-thirds vote of each house, 466.
- clause in State conventions, 466.
- clause in State courts, 467-470.

References are to pages.

COMMERCE (continued)—

- Marshall's opinion in *Gibbons v. Ogden* established jurisdiction of Congress over, 470-475.
- definition of, 477.
- regulation of foreign, considered, 479-483.
- foreign, defined, 482, 483.
- Fuller, Chief Justice, on, 475.
- Harlan, Justice, on, 476, 477.
- Miller, Justice, on regulation of, 477 n.
- Beveridge on regulation of, 477 n.
- power of Congress over navigation as, 497.
- power of Congress over interstate, 499.
- when power of Congress over, is exclusive, 491.
- power of Congress over telegraph as instrument of, 505-508.
- power of Congress over telephone as instrument of, 509-511.
- original packages as, history of term, 511-516.
- with Indians, considered, 516-519.
- business not considered as interstate, 519.
- federal regulation of State products as, 521.
- federal regulation of articles made by women and children as, 523.
- line of demarcation between States and Congress relative to, considered, 524-532.
- Congress cannot control the manufacture of goods in a State under commerce clause, 532 n.
- when Congress may regulate relations of master and servant under commerce clause, 533, 534.
- State commerce not subject to power of Congress, 540.
- where State commerce stops and interstate begins, 540.
- extent of State control over, 542.
- State's control over foreign corporations, 543-547.
- State cannot discriminate between foreign products, 547.
- State taxation of railroad receipts, 551.
- State regulation of long and short hauls, 551, 552.
- State regulation of railroad trains, 553, 554.
- State regulation of stopping trains at stations, 554-560.
- State regulation of Sunday trains, 560-563.
- State regulation of white and colored passengers, 563, 564.
- State regulation of inspection laws, 565-568.
- State regulation of quarantine laws, 568, 569.

COMMISSION, INTERSTATE COMMERCE—

- creation of, 536.
- duties of, 537.
- duties of, as defined by Senator Knox, 538 n.
- Shiras, Justice, on purpose of interstate commerce law, 538, 539.

References are to pages.

COMMITTEE—

- on Declaration of Independence, 13-15.
- on preparing Articles of Confederation, 23.
- of Detail, in Constitutional Convention, 76.
- of Eleven, in Constitutional Convention, 76.
- on Style, in Constitutional Convention, 90 n.
- on Style, reported Preamble to Convention, 91.
- on Elections, in the House of Representatives and in the Senate, 282.
- on Assumption of State Debts in Constitutional Convention, 1328.
- on Revision in England, passes upon laws of Parliament, 1168 n.
- on Reconstruction after the Civil War, 1598.

COMMON CARRIERS (see INTERSTATE COMMERCE).

- subject to interstate commerce laws, 538 n.
- Waite, Chief Justice, on, 531.

COMMON DEFENSE—

- definition of, 102, 103.
- Hamilton and Madison on, 103.

COMPACTS—

- definition of, 845.
- between States prohibited, 845.

COMPENSATION—

- of Senators and Representatives, 301-305.
- of the President, 902-907.
- of Judges, 1078-1081.
- what is just, 1469, 1470.
- private property cannot be taken without just, 1458-1470.

COMPROMISE—

- representation in the Senate, a, 226 n, 233, 234.

COMPULSORY PROCESS FOR WITNESSES—

- in impeachment trials, 214.
- under the Sixth Amendment, 1485.
- before Congressional Committees, 286, 287.
- before interstate commerce commission, 538 n.

COMPURGATION—

- trial by, 1135.

CONCEALED WEAPONS—

- not included in the Second Amendment, 1411.

References are to pages.

CONCURRENT RESOLUTIONS OF CONGRESS—

not submitted to the President for his approval, 378.

CONFESSION—

of treason, 1153.

CONFISCATION—

right of in time of war, 680.

Act of 1862, concerning, opposed by President Lincoln, 1157, 1158.

CONFRONTED BY WITNESSES—

right of accused to be, 1483.

CONGRESS—

all legislative powers granted to, 110.

two branches of, established, 110, 122, 124 n.

limitation of powers of, 114.

definitions of legislative power, 114, 115.

debate in Constitutional Convention on legislative powers of, 119-121.

when term "Congress" first used, 121.

members of lower branch of, elected biennially, 125, 126.

qualifications of members of lower branch of, 141-148.

power of, to apportion Representatives, 162-172.

power of, to lay direct taxes, 172-176.

speakers of lower house of, 204-206.

upper branch of, how composed, 224.

shall meet annually, 275.

power of to control elections for Representatives, 274, 275.

power of each house to judge of elections, qualifications and return of its members, 280-284.

power of each house of, to make its own rules and punish and expel members, 284-293.

power of each house of, to keep a journal, 293-295.

records of each house of, 296-298.

power of each house of, to adjourn, 298-300.

compensation of members of, 301-305.

privileges of members of, 306-330.

members of not to hold other offices, 330-341.

revenue bills to originate in lower house of, 342.

every bill passed by, shall be presented to the President, 353.

two-thirds vote of each house of, may overrule a veto, 359.

resolutions of, signed by the President, 378-380.

power of, to lay and collect taxes, duties, imposts and excises, 382-386.

definition of taxing power of, 384.

References are to pages.

CONGRESS (continued)—

- manner of collecting taxes by, 404.
- must pass uniform laws on the subject of taxation, 404.
- may borrow money on the credit of the United States, 410.
- power of, to regulate commerce, discussed, 453-570.
- power of, to establish a rule of naturalization, 612-624.
- power of, to coin money, 634-639.
- power of, to regulate weights and measures, 639, 640.
- power of, to punish counterfeiting, 640, 641.
- power of, to establish post offices and post roads, 641-654.
- power of, to grant copyrights, 655-660.
- power of, to grant patents, 660.
- power of, to establish inferior judicial tribunals, 667-670.
- power of, to punish piracy and felonies, 670-676.
- power of, over punishment of offenses against the laws of nations, 675.
- power of, to declare war, 676-681.
- power of, to grant letters of marque and reprisal, 681.
- power of, to make rules regarding captures on land and water, 683.
- power of, to raise and support armies, 684-686.
- power of, over armies exclusive, 686.
- power of, to maintain a navy, 686, 687.
- power of, to make rules for government of land and naval forces, 687-689.
- power of, over the militia, 689-691.
- power of, to provide for organizing and arming the militia, 691.
- power of, over forts, arsenals and dock yards, 699-701.
- power of, to make all laws necessary to execute the foregoing and other powers, 701-714.
- can suspend writ of habeas corpus when, 721-733.
- can pass no bill of attainder or ex post facto laws, 733-746.
- can only lay poll or other direct taxes according to census, 747-749.
- cannot lay duty on articles exported by States, 749-751.
- can give no preferences to ports of States, 751-754.
- appropriations by, necessary before money can be drawn from treasury, 755, 756.
- cannot grant titles of nobility, 757-762.
- may impair the obligation of contracts, 829-834 n.
- may allow States to lay duties on imports or exports, 834-837.
- may allow States to lay duties on tonnage, 843.
- may allow States to keep troops or ships of war in time of peace, 844.
- may allow States to enter into compacts, 845.
- may allow States to engage in war, 845-848.
- members of, cannot be presidential electors, 887.

*References are to pages.***CONGRESS (continued)—**

- may determine the time of choosing presidential electors, 889.
- can provide for succession to the Presidency, 896-899.
- power of, to fix compensation of President, 907.
- may control appointment of inferior officers, 972.
- cannot abolish Supreme Court, 1053.
- whether, can abolish lower courts, 1074-1078.
- when, may direct place for trial of crimes, 1145.
- may declare punishment for treason, 1154.
- power of, to prescribe how acts and records of States shall be approved, 1194-1205.
- may admit new States into the union, 1245-1250.
- power of, to make rules respecting the territory and other property of the United States, 1255.
- power of, to govern territory, 1260-1263.
- power of, over national domain, 1263-1265.
- power of, to guarantee republican form of government to the States, 1287-1292.
- may determine when a State has a republican form of government, 1287.
- power of, to propose amendments to the Constitution, 1301-1307.
- cannot deprive a State of equal suffrage in the Senate without its consent, 1307.
- can make no law respecting the establishment of religion or prohibiting the free exercise thereof, 1375-1397.
- can make no law prohibiting the freedom of speech or of the press, 1398, 1405.
- can make no law prohibiting the right to assemble and petition the government, 1405-1407.
- power of, to enforce the Thirteenth Amendment, 1582, 1589.
- power of, to reduce representation of States in Congress under Fourteenth Amendment, 1650-1653.
- power of, to enforce the Fourteenth Amendment, 1659.
- power of, to enforce the Fifteenth Amendment, 1667-1669.

CONKLING, ROSCOE—

- member of Reconstruction Committee, 1698.
- conferee on Fifteenth Amendment, 1671.

CONNECTICUT—

- delegates from, in first Colonial Congress, 1.
- delegates to Congress instructed by, 3.
- signed the Articles of Confederation, 25, 1697.
- instructed delegates to Constitutional Convention, 47.
- elected delegates to Constitutional Convention, 58.
- opposed a new constitution, 74, 75.

References are to pages.

CONNECTICUT (continued)—

- members of first Senate from, 225.
- ratified the Constitution, 1345.
- ancient bill of rights in charter of, 1352 n.

CONSOLIDATION OF CORPORATIONS—

- subject to legislative control, 822.

CONSTITUTION OF THE UNITED STATES—

- first suggestions concerning a, 80.
- Pelotiah Webster on, 81.
- Noah Webster on, 82.
- Hamilton on, 84.
- Paine on, 85.
- history of the Preamble to the, 89.
- Preamble reported by Committee of Detail, 90.
- Preamble proposed by Randolph, Pinckney and Hamilton, 90.
- Preamble reported by the Committee on Style, 90, 91.
- Preamble reported late in convention, 91.
- Nott, Chief Justice, on Preamble, 91 n.
- meaning and purpose of the Preamble, 92.
- what is a Preamble, 92.
- analysis of the Preamble, 93.
- purpose of Preamble as to perfect union, 99.
- purpose of Preamble as to justice, 100.
- purpose of Preamble as to domestic tranquility, 102.
- purpose of Preamble as to common defense, 102-103.
- purpose of Preamble as to general welfare, 103.
- purpose of Preamble as to securing liberty, 104.
- Madison proposed amendment to Preamble, 105 n.
- attack on Preamble by Patrick Henry, 105, 106 n.
- proposed amendment to Preamble by Committee of Eleven, 106.
- was adopted for the United States, and not for the States, 94, 95.
- characteristics of the, 98.
- what is a Constitution? 107-109.
- legislative powers vested in Congress under the, 110-124.
- history of legislative clause of, 112.
- limitation of powers of Congress under, 114.
- legislative power of Congress cannot be delegated under, 117.
- House of Representatives chosen every two years under, 126.
- chosen by people of the States under, 130.
- qualifications of electors for Representatives under, 132.
- right of suffrage defined, 137-140.
- qualifications of Representatives, 141, 161.
- who are citizens of United States under the, 148.
- citizenship defined under the, 151-155.

References are to pages.

CONSTITUTION OF THE UNITED STATES (continued)—

"State" defined under, 157.

State cannot add new qualifications for Representatives under, 157.
views of Jefferson on power of States to add new qualifications
for Representatives, under, 158-160.

Representatives and direct taxes, 162-198.

apportionment of Representatives under, 162.

apportionment among the States under, 169.

apportionment of direct taxes, 170.

representation and population, 170-173.

income tax, 188-193.

Hamilton's argument in *Hylton v. United States*, 193-196.

vacancies in House of Representatives, how filled, 199, 202.

Speaker and other officers of House of Representatives, 202-204.

House of Representatives has sole power of impeachment, 207.

purpose of impeachment, 208.

method of procedure in impeachment, 209-212.

papers to be filed in impeachment, 212-214.

cannot impeach after expiration of office, 215.

evidence in impeachment trials, 216.

Senators right to vote in impeachment trials cannot be challenged,
217.

Senators cannot be excused from sitting in impeachment trials, 220.

the Senate, how members of, elected, 224, 227, 241.

each State entitled to two Senators, 224.

powers of the Senate, 226.

length of senatorial term, 230.

vote of a State in Senate, 232.

no power to instruct Senators by State Legislature, 234-236.

classification of Senators, 242-244.

qualifications of Senators, 246-250.

Vice-President to be President of Senate, 250-254.

Officers of the Senate, 255-256.

Senate has sole power to try impeachments, 256.

Senators must be on oath at impeachment trials, 257.

Chief Justice to preside at impeachment trial of the President, 257.

vote of two-thirds of Senators present necessary to convict, 263.

number necessary to constitute a quorum, 264.

extent of judgment in case of impeachment, 266.

seat of Senator, how vacated, 269.

election of Senators, 270-274.

control of Congress over elections for Representatives, 274.

Congress to meet yearly in December, 275-279.

each house of Congress judge of the election of its own members,
280-284.

References are to pages.

CONSTITUTION OF THE UNITED STATES (continued)—

- committee in each house appointed on elections, 282.
- power of each house to expel members, 284-288.
- journals of each house, 293-295.
- yeas and nays, when called for, 295.
- journals of Congress considered as records by courts, 296-298.
- adjournment of each house limited to three days without the consent of the other house, 298.
- compensation of members of Congress, 301-306.
- members of Congress privileged from arrest, 306-341.
- privilege personal only, 307.
- treason and breach of the peace excepted from the privilege, 308-309.
- privileged in going to and coming from Congress, 310-312.
- privilege extended to delegates in Congress, 313.
- provisions of the common law not applicable, 313.
- privilege and civil summons, 314-319.
- privilege extended to ambassadors, ministers and consuls, 319, 320.
- freedom of debate in Congress guaranteed, 322-325.
- members of Congress cannot be questioned elsewhere for speeches made in Congress, 322-325.
- privilege under Articles of Confederation, 325.
- members of Congress prohibited from holding other federal positions, 330-341.
- revenue bill to originate in House of Representatives, 342-352.
- reasons for this provision, 343-349.
- revenue bills defined, 351.
- President's approval necessary to a bill, 353-380.
- history of the veto power, 355.
- two-thirds vote necessary to pass bill over President's veto, 359.
- veto power called "deity of our system" by Calhoun, 361.
- presenting a bill to the President for his signature, 362.
- return of bill by President to Congress, 364.
- meaning of "two-thirds", 366-371.
- reasons for the veto power, 372.
- number of bills vetoed, 376.
- joint resolutions must be signed by the President, 377, 378.
- concurrent resolutions need not be signed by the President, 377, 379.
- express powers of Congress concerning taxation, 381-409.
- power of Congress to lay and collect taxes, 382-384.
- duties, imposts, and excises to be uniform, 406-409.
- power of Congress to borrow money on credit of United States, 410-452.
- power of Congress to regulate commerce, 453-570.

References are to pages.

CONSTITUTION OF THE UNITED STATES (continued)—

- trade among the Colonies, 454.
- trade under the Articles of Confederation, 456.
- trade with the Indians, 462.
- commerce clause in State Conventions, 466.
- commerce clause in State Courts, 467.
- commerce defined in *Gibbons v. Ogden*, 470-475.
- regulation of foreign commerce, 479-483.
- commerce among the states, 480-570.
- reasons for giving the power over commerce to Congress, 484-487.
- what are interstate shipments, 487.
- extent of commerce power, 489-491.
- when the power of Congress over commerce is exclusive, 491-496.
- agencies of interstate commerce, 496.
- power of Congress over navigation, 499.
- power of Congress over bridges and wharves, 500.
- power of Congress over railroads and railway rates, 502-504.
- power of Congress over telegraphs and telephones, 505-511.
- original packages, 511.
- State products, federal regulations of, 521, 523.
- products of women and children, 523.
- limitations on the power of Congress, 524, 528.
- rights of corporations, 531.
- regulation of manufactories, 532.
- Interstate Commerce Commission, 536.
- duties and powers of Commission, 537-538.
- when State commerce becomes interstate commerce, 540.
- how far may States legislate on the subject of commerce, 542.
- States and foreign corporations, 543.
- State regulation of foreign products, 547.
- C. O. D. shipments, regulation of, 549.
- State regulation of railroads, 551.
- taxation of receipts, 551.
- long and short hauls, regulation of, 551, 552.
- regulation of trains, 553-560.
- State regulation for carrying of colored passengers, 563.
- inspection laws, 565.
- quarantine laws, 568.
- corporations and combinations, 571-595.
- limited number of corporations at beginning of government, 572.
- power of Congress to charter corporations, 572, 576.
- necessity of corporations, as instruments of commerce, 577-578.
- federal trust legislation, 581.
- police power not conferred upon Congress, 596.
- State rights in Constitutional Convention, 596.

References are to pages.

CONSTITUTION OF THE UNITED STATES (continued)—

- police power of States defined, 598, 599.
- general doctrine of police power, 602.
- recognition of police power by federal courts, 604.
- States did not surrender their police power on formation of the, 609.
- naturalization under the, 612-624.
- uniform rule of naturalization, 612.
- diversity of naturalization laws under Articles of Confederation, 613.
- Congress has sole power to enact naturalization laws, 615.
- what is naturalization, 616.
- naturalization by treaty, 617.
- naturalization by act of Congress, 617.
- who may be denied naturalization, 618, 619.
- who may be naturalized, 619.
- why control of naturalization given to Congress, 620.
- States can confer only State citizenship, 620-622.
- exclusion of aliens from naturalization, 622-624.
- bankruptcy and uniform laws on, 624.
- history of bankruptcy, 625-630.
- Congress has sole power of coinage, 634-639.
- States could coin money under Articles of Confederation, 634.
- decimal money, 635.
- establishment of mint, 636.
- power of Congress to establish weights and measures, 639.
- power of Congress to punish counterfeiting, 640.
- power of Congress to establish post offices and post roads, 641.
- views of Presidents on post roads and internal improvements, 643-648.
- power to make internal improvements established, 648.
- use of mails, 649.
- power to condemn property for post office department, 650-654.
- promotion of science and arts, 655.
- power of Congress over copyright, 657-660.
- power of Congress over patents, 660-664.
- power of Congress over trademarks, 664-666.
- power of Congress to establish inferior courts, 667-670.
- power of Congress to punish piracy and felonies on high seas, 670.
- piracy defined, 673.
- law of nations concerning piracy, 675.
- control of Congress over high seas, 675.
- power of Congress to declare war, 676.
- how war is declared, 680.
- letters of marque and reprisal, 681.

References are to pages.

CONSTITUTION OF THE UNITED STATES (continued)—

- rule concerning captures, 683.
- power of Congress to raise and support armies, 684.
- power of Congress over armies exclusive, 686.
- power of Congress to maintain a navy, 686.
- power of Congress to make rules for the government of land and naval forces, 687-689.
- President's power as commander in chief, 688.
- President's power to call out the militia, 689-691.
- President's power to govern militia, 691-693.
- right of States to maintain militia, 693.
- power of Congress to establish a seat of government, 695.
- government of the District of Columbia, 696n.
- power of Congress over district of Columbia is exclusive, 698.
- power of Congress over forts, arsenals, dockyards, etc., 699-701.
- power of Congress to make laws necessary for the execution of the foregoing powers, 701-714.
- powers denied to Congress, 715-762.
- Congress could not prohibit introduction of slaves into the United States until after 1808, 715.
- compromise between free and slave States, 716.
- Pinckney's speech in House of Representatives on slavery compromise, 718.
- writ of habeas corpus, 721-733.
- history of habeas corpus, 721.
- power to suspend writ of habeas corpus, 724.
- bills of attainder, 733-739.
- ex post facto laws prohibited, 739-746.
- duties on exports prohibited, 749.
- preferences among ports of different states prohibited, 751.
- money cannot be withdrawn from national treasury except by appropriation, 755.
- granting titles of nobility prohibited, 757.
- acceptance of presents from foreign princes forbidden, 757-762.
- States prohibited from making alliances, 763.
- States prohibited from granting letters of marque, 763.
- States prohibited from coining money or emitting bills of credit, 763-774.
- States prohibited from making anything but gold and silver coin legal tender, 763-774.
- States prohibited from passing bills of attainder or ex post facto laws, 774.
- State prohibited from passing laws impairing obligation of contracts or laws granting titles of nobility, 763.
- history of obligation of contracts, 774-776, 779.

References are to pages.

CONSTITUTION OF THE UNITED STATES (continued)—

- obligation of contracts defined, 788-800.
- Congress not forbidden to impair the obligation of contracts, 829-834.
- States forbidden to lay duties, 834.
- States forbidden to keep troops or ships of war in time of peace, 843.
- States forbidden to contract with other States or foreign powers, 846-848.
- States forbidden to engage in war except in time of invasion, 848.
- power vested in the President, 850.
- tenure of office, of President, 867-870.
- President may delegate certain of his powers, 871-873.
- manner of electing the President, 875-890.
- members of Congress or federal officers prohibited from being presidential electors, 887.
- Congress fixes day for election of President, 888.
- qualifications for President, 888-891.
- when Vice-President succeeds to Presidency, 891.
- inability of President, 892-896.
- President succeeded by Vice-President in case of "inability," 891.
- "inability" of President, how may be determined, 893-985 n.
- when the duties of President devolve on Vice-President, 893.
- order of succession to presidency established by Congress, 897.
- term of President under succession act, 900, 901.
- compensation of President, 902.
- oath of President, 907-910.
- President commander in chief of army and navy, 911.
- Senator Bacon on reason for making President commander in chief, 913 n.
- war power of President, 913, 914.
- President, when commander of militia, 920-923.
- President may require opinion in writing from heads of departments, 923.
- President may grant reprieves and pardons, 935.
- President cannot pardon in case of impeachment or contempt of court, 941-945.
- President's power to make treaties, 948.
- power of Senate in making treaties, 953.
- right of House of Representatives to concur in treaties, 957.
- President's power of appointment, 967-972.
- President may appoint ambassadors, ministers, consuls and judges, 967.
- inferior officers, how appointed, 972.
- power of removal not conferred by Constitution, 972.

*References are to pages.***CONSTITUTION OF THE UNITED STATES (continued)—**

power of removal judicially construed to be in President, 982-987.

President may fill vacancies in "recess" of Senate, 988-998.

meaning of "recess," 990, 995.

relation of President and Senate to recess appointments, 995.

vacancies must be actual, 997.

President shall give Congress information as to state of the Union, 997-1000.

President may convene Congress when, 1001, 1003.

President shall receive ambassadors, etc., and execute the laws, 1003.

executive powers, 1004-1006.

President shall commission federal officers, 1006.

impeachment of President, Vice-President and inferior officers, 1027-1038.

military and naval officers and members of Congress not impeachable, 1031.

judicial power vested in supreme and inferior courts, 1050.

what are "inferior courts", 1066.

tenure of judicial office, 1069.

compensation of judges, 1078-1081.

jurisdiction of federal courts, 1081-1083.

judicial power, to what it extends, 1084-1121.

original jurisdiction of Supreme Court, 1122-1127.

appellate jurisdiction of Supreme Court, 1127-1133.

trial of all crimes except impeachment to be by jury, 1134.

trial must be in State where crime is committed, 1143.

if trial not in State where crime is committed Congress directs where it shall be held, 1144.

treason under, considered, 1145, 1167.

"full faith and credit" between States, 1193-1197.

records and judicial proceedings of States, 1197-1200.

privileges and immunities of citizens under, 1205, 1221.

privileges and immunities of citizens defined, 1208.

surrender of fugitives, 1222, 1224.

treason against a State, 1224.

admission of new States into the Union, 1245-1252.

territories governed by Congress, 1255-1263.

power of Congress to govern territories complete, 1260.

rights of inhabitants in territories, 1261.

form of government for territories, 1261.

territory of the United States, 1262.

acquisition and government of national domain, 1263, 1269.

government of acquired territory, 1269, 1281.

republican form of government guaranteed to States by, 1282, 1301.

References are to pages.

CONSTITUTION OF THE UNITED STATES (continued)—

Congress determines when such form of guarantee exists, 1287.
 protection of States against invasion or insurrection, 1293.
 protection in case of domestic violence, 1294.
 manner of proposing amendments to Constitution, 1301-1321.
 equal suffrage of States in Senate, 1307-1312.
 a State cannot rescind its ratification of an amendment, 1313.
 adoption of amendment by a State unqualified, 1315-1318.
 President's approval of amendments not necessary, 1318.
 all prior debts and engagements of States to be valid, 1322-1325.
 to be the supreme law of the land, 1325-1331.
 oaths, of whom required, 1332-1340.
 no religious test shall be required as a qualification for office or public trust, 1338-1340.
 ratification by nine States sufficient for establishment of, 1340.
 transmitted to Congress by Convention, 1344.
 order in which the States ratified the, 1345.
 signatures to the, 1346-1350.
 history of first ten amendments to, 1351-1370.
 amendments to, constitute a bill of rights, 1351.
 House and Senate agree on amendments to, 1367.
 First Amendment to, 1371.
 Second Amendment to, 1408.
 Third Amendment to, 1412.
 Fourth Amendment to, 1414.
 Fifth Amendment to, 1431.
 Sixth Amendment to, 1472.
 Seventh Amendment to, 1490.
 Eighth Amendment to, 1505.
 Ninth Amendment to, 1523.
 Tenth Amendment to, 1524.
 Eleventh Amendment to, 1535.
 Twelfth Amendment to, 1553.
 Thirteenth Amendment to, 1582.
 Fourteenth Amendment to, 1594.
 Fifteenth Amendment to, 1667.
 amendments to, adopted but not ratified, 1676-1679.

CONSTITUTIONAL CONVENTION—

Governor Bowdoin suggested meeting of delegates to discuss trade laws, 38.
 New York demanded a trade convention, 38, 39.
 Virginia appointed commissioners to meet other commissioners at Annapolis to consider trade disputes, 39.
 commissioners from five States met at Annapolis, 41-43.

References are to pages.

CONSTITUTIONAL CONVENTION (continued)—

commissioners recommended a Convention in Philadelphia, 43.
 Alexandria Conference, 44.
 Congress suggested a Convention to meet in Philadelphia, 45-46.
 States instructed their delegates to Philadelphia Convention, 46-48.
 power of the Convention to go beyond amending Articles of Confederation doubted, 48.
 King, Jay and Washington on power of Convention to form a Constitution, 49-51.
 Paterson and Lansing opposed new Constitution, 53, 54.
 Randolph's plan of a Constitution, 52.
 details of Randolph's plan, 52 n.
 Madison favored a Constitution, 54, 57.
 opening of the, 57.
 Washington chosen president of the, 57.
 sketches of the delegates to the, 58, 64.
 some delegates refuse to serve in, 64.
 Rhode Island not represented in, 64.
 four plans for a Constitution submitted in, 65-75.
 Randolph's plan, 65, 66.
 Pinckney's plan, 66.
 mystery of the Pinckney Draft discussed, 67 n.
 Paterson's plan, 68.
 sentiment in for abandoning the Articles of Confederation, 74, 75.
 Hamilton's plan of a Constitution presented, 75.
 plan of a Constitution reported by the Committee of the Whole, 76.
 Committee of Eleven and Committee of Detail appointed, 76.
 Bryce on causes of the Constitution, 77 n.
 Preamble proposed by Randolph, Pinckney and Hamilton, 80.
 Preamble reported by Committee of Detail and Committee on Style, 90, 91.
 Convention transmits the Constitution to Congress, 1344.
 delegates to, sign the Constitution, 1346-1350, 1770.
 refused to embody bill of rights in Constitution, 1351, 1357.
 Hamilton and Madison defended action of, in omitting bill of rights from the Constitution, 1353, 1357.
 text of Randolph's plan of a Constitution, 1699.
 text of Pinckney's plan of a Constitution, 1702.
 text of Paterson's plan of a Constitution, 1709.
 text of Hamilton's plan of a Constitution, 1712.
 speech by Hamilton in submitting his plan to the, 1726.
 report of Committee of the Whole, 1737.
 resolutions adopted by, 1740.
 report of Committee of Detail to, 1744.
 text of the Constitution submitted by, 1757.

References are to pages.

CONSTITUTIONAL CONVENTION, DEBATES IN—

- on the Preamble, 89-91.
- on legislative powers of Congress, 110, 114, 119-121.
- on biennial elections to the House of Representatives, 126-130.
- on election by the people, 130-132.
- on qualifications of voters for Representatives, 133-137.
- on qualifications of Representatives, 142.
- on effort to limit voters to freeholders, 144-147.
- on residence of Representatives, 155.
- on apportionment of Representatives and direct taxes, 162-174.
- on election of Senators, 226-229.
- on number of Senators from each State, 229.
- on length of Senatorial term, 230.
- on vote of each State in Senate, 232-234.
- on classification of Senators, 242-244.
- on Vice-President as presiding officer of the Senate, 250, 254.
- on impeachment, 256, 258, 263, 267.
- on election of Senators by State legislatures, 270-273.
- on annual meetings of Congress in December, 275-278.
- on each house judge of the election of its own members, 280, 282.
- on expulsion of members, 290.
- on journals of each house, 293.
- on adjournment, 298, 300.
- on compensation of members of Congress, 302 n, 305.
- on privilege from arrest, 325.
- on members of Congress prohibited from holding civil office, 330, 336.
- on revenue bills to originate in House of Representatives, 343, 350.
- on veto clause, 354, 356, 359.
- on two-thirds vote necessary to overrule President's veto, 359-361.
- on concurrent measures, 377, 378.
- on power of Congress to lay and collect taxes, 382.
- on power to borrow money on credit of the United States, 410, 416.
- on power of Congress to regulate commerce, 457, 460.
- on commerce with Indians, 462.
- on foreign commerce, 463-466.
- on corporations, 571.
- on police power, 596-598.
- on naturalization, 612, 615.
- on bankruptcy, 630.
- on coinage, 637.
- on post offices and post roads, 642.
- on copyright, 659.
- on power to establish inferior courts, 667, 670.
- on piracies and felonies on high seas, 672.

References are to pages.

CONSTITUTIONAL CONVENTION, DEBATES IN (continued)—

- on power of Congress to declare war, 677.
- on power of Congress over army and navy, 684-687.
- on the militia, 690-692.
- on seat of government, 695, 698.
- on laws to enforce powers of Congress, 701.
- on slave trade, 715.
- on the writ of habeas corpus, 723.
- on bills of attainder and ex post facto laws, 733.
- on capitation taxes, 747.
- on export duties, 749.
- on preference to ports, 751.
- on money, how to be drawn from treasury department, 755.
- on regular reports by treasury department, 756.
- on titles of nobility, 758.
- on limits to State power, 764.
- on obligation of contracts, 775, 778-781, 832.
- on duties and tonnage laws levied by States, 834-837.
- on establishment of executive power, 850-854.
- on a single executive, 854-863.
- on reelection of the President, 863-867.
- on tenure of President's term, 867-870.
- on election of President by electors, 875-886.
- on property qualifications for President, judges and members of Congress, 889, 890.
- on succession of Vice-President to the presidency, 891.
- on compensation of President, 902-906.
- on oath of office, 907.
- on Commander in Chief of Army and Navy, 911.
- on power over militia, 920.
- on Pinckney's proposed Cabinet Council, 924-927.
- on pardons and reprieves, 936.
- on the treaty power, 950-952.
- on appointments by the President, 967.
- on the President giving information to Congress, 998.
- on impeachment, 1027-1030.
- on the establishment of supreme and inferior courts, 1050, 1053.
- on tenure of judges, 1069.
- on compensation of judges, 1078.
- on jurisdiction of Federal courts, 1081.
- on original jurisdiction of Federal courts, 1123.
- on criminal trials, 1134.
- on treason, 1146.
- on giving aid to the enemy, 1150.
- on full faith and credit, 1194-1196.

References are to pages.

CONSTITUTIONAL CONVENTION, DEBATES IN (continued)—

- on privileges of citizens in other States, 1209.
- on fugitives from justice, 1223.
- on treason against a State, 1224.
- on fugitive slaves, 1241.
- on new States, 1246-1249.
- on territories, 1255, 1260.
- on guarantee of republican form of government to the States, 1283-1286.
- on provisions for amendments to the Constitution, 1303-1307.
- on debts of the United States, 1322-1324.
- on oaths of allegiance, 1332-1334.

CONSULS—

- not privileged from arrest in criminal cases, 320.
- term, defined, 1100.
- rank and duties of, 1100-1101.

CONTEMPT—

- punishment of, by Congress, 287.
- of court, President cannot pardon for, 941-945.

CONTINENTAL CONGRESS (see COLONIAL CONGRESS).

- addresses by, 6.
- adoption of Declaration of Independence by, 19-20.
- adoption of Articles of Confederation by, 23.

CONTRACTS, OBLIGATION OF—

- history of the clause concerning, 774, 775-778.
- briefly considered in the Convention, 779.
- Wilson, Gouverneur Morris and King suggested as author of clause, 778 n, 779.
- definition of, 790-794.
- Congress not affected by this clause, 829-834.
- Gerry on, 832.
- Sherman and Ellsworth on, 833.
- Von Holst on, 834.

CONTROVERSIES TO WHICH THE JUDICIAL POWER EXTENDS—

- do not relate to criminal matters, 1104.
- Choate on, 1104 n.
- definition of, 1107.
- Jay, Chief Justice on, 1107.
- Fuller, Chief Justice, on, 1108.
- Harlan, Justice, on, 1109, 1110.

References are to pages.

CONTROVERSIES TO WHICH THE JUDICIAL POWER EXTENDS
(continued)—

- to which the United States shall be a party, 1109.
- between two or more States, 1110.
- between a State and citizens of another State, 1114.
- between citizens of the same State claiming lands under grants by different States, 1120.
- between a State and the citizens thereof and a foreign state and citizens or subjects, 1121.

CONVENTIONS, NATIONAL—
history of, 1575, 1576.

CONWAY, M. D.—
life of Randolph, 52, 53 n.

COOLEY, JUDGE—
on bills of credit, 779, 780 n.
on treaties in the House of Representatives, 958.
on the Constitution and the territories, 1265.
on effect of the Dartmouth College case on corporations, 788 n.
on guarantee of republican form of government, 1292.
on church and state, 1396.
on due process of law, 1450, 1451.
on bills of rights, 1452.
on public use, 1468.
on publicity at trials, 1466.
on cruel punishment, 1511.
on naturalization by States, 1617.
on jury trials, 1643.
on the Fifth Amendment, 1674 n.

COOLIE LABOR—
prohibited by the Thirteenth Amendment, 1588.

COPYING MACHINE—
invented by Jefferson, 661 n.

COPYRIGHT—
in England, 658.
Noah Webster on, 659, 660.
laws concerning, 658-660.

CORPORATIONS AND COMBINATIONS—
foreign corporations in States, 543-547, 817.
Harlan, Justice, on, 548.
debate on corporations in Constitutional Convention, 571, 572.

References are to pages.

CORPORATIONS AND COMBINATIONS (continued)—

- corporations under Colonies and Articles of Confederation, 572.
- power of Congress to charter corporations, 572-576.
- Congress cannot charter a corporation in a State to carry on general business, 573, 574.
- Congress may charter corporations where its jurisdiction is supreme, 575.
- charters granted by Congress to corporations, 576.
- importance of corporations, 577.
- abuses by corporations, 580.
- federal trust legislation, 581.
- anti-trust law of 1890, 582.
- powers given corporations by Dartmouth College decision, 787 n.
- changes in charters of corporations, 817-822.
- consolidation of corporations subject to legislative control, 822.
- corporations not included in privileges and immunities clause, 1219.
- when corporations must produce their books, 1423-1428.
- when due process of law applicable to corporations, 1625.
- equal protection of laws applicable to corporations, 1625-1635.
- corporations are persons within the Fourteenth Amendment, 1635.

CORPSES—

- are not exports, 839.

CORRUPTION OF BLOOD—

- for treason prohibited, 1157.

CORWIN, THOMAS—

- proposed amendment to Constitution, 1679.

COUNCIL OF STATE—

- proposed by Pinckney and Morris, 926.

COUNCIL OF REVISION.—

- proposed by Randolph, 356, 1171.
- in New York, 1171 n.

COUNSEL—

- assistance of, guaranteed to prisoner, 1486-1489.

COUNTERFEITING—

- punishable by Congress, 640.
- punishable by the States, 641.

COUNTING MEMBERS OF THE HOUSE OF REPRESENTATIVES—

- to determine if quorum is present, 286.

COUNTIES—

- can be sued, 1119.

References are to pages.

COUNTY SEATS—

stopping of trains at, 586.

COUNTY TREASURERS—

laws for relief of unconstitutional, 828.

COURTS, FEDERAL—

President appoints members of, 967, 972.

Supreme Court, created by the Constitution, 1054.

Inferior Courts, created by Congress, 1066.

Territorial Courts, 1066.

Provisional, established by President Lincoln, 917, 918.

Consular, 1069.

judges of, no qualifications prescribed for, 1167 n.

COVETOUSNESS—

Franklin on, 890 n.

COX, JUDGE—

impeachment of, 1037.

COXE, TENCH—

Madison's letter to, 833 n.

COWELL—

on imposts and customs, 388.

on tonnage, 843.

COWEN, JUDGE—

defined bankruptcy, 628.

CRAGIN, AARON H.—

on Fifteenth Amendment, 1667.

CRANCH, JUDGE—

on serving the President with summons, 1018-1023.

CRANE, STEPHEN—

member of first Colonial Congress, 2.

CREDIT CLAUSE—

considered, 414.

CRIME—

definition of, 1139.

"CRIMES ACT"—

of 1789, 1144.

CRIMINAL CASES—

jury trial in guaranteed, 1134.

presentment or indictment in, only by grand jury, 1435, 1436.

References are to pages.

CRIMINAL CASES (continued)—

- definition of, 1444.
- speedy and public trial in, 1472-1479.
- impartial jury in, 1477.
- accused to know nature of accusation in, 1480-1482.
- accused entitled to copy of indictment in, 1483.
- accused entitled to copy of indictment in, 1483.
- accused to have compulsory process for witnesses in, 1485.
- accused to have aid of counsel in, 1486-1489.
- excessive bail prohibited in, 1505-1509.
- excessive fines not allowed in, 1509.
- cruel and unusual punishment prohibited in, 1510-1522.
- death penalties in, 1512.

CRISP, CHARLES F.—

- Speaker of House of Representatives, 206.

CRITTENDEN, JOHN J. ATTORNEY GENERAL—

- on the pardoning power of the President, 940.

CROWN WARRANTS—

- issued in Massachusetts, 1415-1419.

CRUEL PUNISHMENT—

- See EIGHTH AMENDMENT.

CRUMPACKER, E. D.—

- on the reduction of representation in Congress, 1653.

CULLOM-REAGAN ANTI-TRUST BILL—

- history of, 582.

CUMBERLAND ROAD—

- history of construction of, 489, 577.
- bill for construction of, vetoed by President Monroe, 392, 645.

CURTIS, GEORGE TICKNOR—

- on weakness of the second Colonial Congress, 26, 31.
- on passage of bills over President's veto, 360 n.
- on inability of the President, 894 n.
- on succession to the Presidency, 900-902.
- on early Presidents and their cabinets, 932 n.

CURTIS, JUSTICE—

- defined "a case." 1080.
- on appellate jurisdiction of the Supreme Court, 1130.
- on treason, 1149.
- on commercial powers of Congress, 490-492.

References are to pages.

- CURTIS, JUSTICE (continued)**—
 on privileges and immunities of citizens, 1208.
 on territories, 1262.
 on due process of law, 1449.
 defended President Johnson in his impeachment trial, 1034.
- CUSHING, THOMAS**—
 member of first Colonial Congress, 1.
 moved to open Congress with prayer, 5.
- CUSHING, CALEB, ATTORNEY GENERAL**—
 on President's power over the navy, 688.
 on suspension of writ of habeas corpus, 722.
 on duties of cabinet officers, 923.
 on ambassadors and public ministers, 970.
- CUSHING, JUSTICE**—
 on the power of the judiciary, 1181.
- CUSTOMS DUTIES**—
 considered, 386-389.
- CZAR ALEXANDER**—
 presented gift to Jefferson while President, 762 n.

D.

- D'ALEMBERT**—
 on equality, 1631.
- DALHOUSIE, LORD**, 1233 n.
- DALLAS, GEORGE M.**—
 action in Nugent contempt case, 290, 291.
 differed with Calhoun concerning state citizenship, 1616 n.
- DALTON, TRISTAM**—
 member of first Senate, 225.
 member of Committee on title for President, 851 n.
 opposed Senate passing on removals, 978 n.
- DANA, FRANCIS**—
 refused to serve in Constitutional Convention, 64.
 signed Articles of Confederation, 1697.
- DANA, RICHARD H., JR.**—
 on privilege of ambassadors, 319.
- DANBURY BAPTISTS**—
 Jefferson's letter to, 1386.

References are to pages.

DANBY, EARL OF—

impeachment of, 222, 223 n.

DANE, NATHAN—

on plans for a Constitution, 49, 52.

on the Constitution, 97.

DANIEL, JUSTICE—

on foreign commerce, 482.

on contracts under the Constitution, 814.

on suits at common law under the Seventh Amendment, 1495.

DARTMOUTH COLLEGE CASE—

charter from George III, 785.

charter impaired by State, 785.

Marshall's decision in, 785-787.

Marshall's definition of contract in, 786.

DAVIS, JOHN W.—

Speaker of House of Representatives, 205.

DAVIS, GARRETT—

moved to amend Fourteenth Amendment, 1604.

DAVIS, JEFFERSON—

trial of for treason, 1655, 1666.

pleaded Fourteenth Amendment as bar to his prosecution, 1655.

DAVIS, JUSTICE—

on trade with Indians, 519.

on habeas corpus, 727.

on law and equity, 1090.

on speedy trial, 1473.

on the Tenth Amendment, 1527.

DAVIE, WILLIAM R.—

delegate to Constitutional Convention, 61.

failed to sign Constitution, 65.

member of Committee of Detail, 76, 233 n.

in debates in Convention, 869, 1028.

DAWES, HENRY L.—

Chairman of House Committee on Elections, 142, 157.

DAY, JUSTICE—

on interstate commerce, 496.

on territories under the Constitution, 1278.

on irregular evidence, when it may be used, 1429.

on trial by jury, 1480.

on unjust taxation, 1647.

References are to pages.

DAYTON, JONATHAN—

delegate to Constitutional Convention, 59, 60.
youngest member of Convention, 64.
Speaker of House of Representatives, 204.
signed the Constitution, 1346.

DEADY, JUDGE—

on habeas corpus, 725, 727.
on pardon, 939.

DEANE, SILAS—

member of First Colonial Congress, 1.
envoy to France, 32, 94.

DEATH, PENALTY OF—

pardon in case of, by President, 941.
Fuller, Chief Justice, on, 1518.
not cruel punishment, 1518.

DEBATES (see CONSTITUTIONAL CONVENTION, DEBATES IN).

DEBTORS OF UNITED STATES—

their right to vote debated in Constitutional Convention, 145, 147.

DEBT—

imprisonment for, 825.

DEBTS OF UNITED STATES—

under Articles of Confederation, 30.
power of Congress to pay, 382, 405.
Pinckney author of clause concerning, 382 n.
Jefferson on, 390.
Hamilton on, 391.
Monroe on, 392-397.
payment of, 404.
payment of by legal tender notes, 427.
debts prior to adoption of Constitution declared valid, 1322.
debate in Convention on, 1322, 1324.
Madison on, 1324.

DECEMBER—

Congress meets on first Monday of each, 275.
why chosen, 277.

DECLARATION OF INDEPENDENCE—

demand for first made by Virginia, 13.
written by Jefferson, 13-17 n.
John Adams and R. H. Lee on authorship of, 17 n.
Pinckney on, 17 n.
reported by Committee on Independence, 15.

References are to pages.

DECLARATION OF INDEPENDENCE (continued)—

McKean's account of the adoption of, 18 n.
 adopted but not signed on July 4, 18 n.
 signing of hastened by a swarm of flies, 19 n.
 opposed by Wilson, Livingston and Rutledge, 20.
 New York and South Carolina withheld their approval of, 20.
 Calhoun on, 1632, 1633.
 Choate on, 1633.

DECLARATION OF RIGHTS BY PARLIAMENT, 1352 n.
 read to William III, 1505 n.

DECLARATION OF RIGHTS BY FIRST COLONIAL CONGRESS, 6.

DECLARATION OF UNITED COLONIES TO THE KING, 12.

DECLARATION OF WAR (see WAR)—

DECIMAL COINAGE—

Robert Morris on, 635.

DEERING, SIR EDWIN—

imprisoned for printing speeches delivered in Parliament, 1390.

DEFENSE—

under Franklin's plan of Union, 21.
 power of, under Articles of Confederation, 27.
 under Constitution, 102.
 common, 102, 103.
 under power to provide for, 382.
 Monroe on power of, 392.

DE HART, JOHN—

member of First Colonial Congress, 2.

DELAWARE—

delegates from, to First Colonial Congress, 2.
 delegates from unwilling to sign Declaration of Independence, 20.
 sent delegates to Annapolis Conference, 42.
 delegates from, in Constitutional Convention, 58, 59.
 opposed national government, 75.
 members from, in first Senate, 225.
 provision in Constitution concerning vacancies taken from Constitution of, 242.
 provisions of Constitution of, on impeachment, 256.
 Constitution of prohibited titles, 758.
 governor of, called "President," 851.
 constitutional provision of, on amendments, 1302.
 religious tests under Constitution of, 1338 n.

References are to pages.

DELAWARE (continued)—

- first State to ratify federal Constitution, 1345.
- delegates signed Constitution, 1347, 1770.
- ratified the Constitutional amendments, 1368.
- constitutional provision of, on religious freedom, 1397.

DELEGATES—

- to first Colonial Congress, 1, 2.
- to Annapolis Conference, 39.
- to the Constitutional Convention, 58, 64.
- some withdrew from the Convention, 64.
- some refused to sign the Constitution, 65.

DELEGATES FROM TERRITORIES—

- granted privileges of members of Congress, 313.

DE LOLME—

- on habeas corpus, 722.
- on freedom of the press, 1399, 1401.

DENIO, JUDGE—

- on privileges and immunities of citizens, 1211.

DEPARTMENTS OF GOVERNMENT (see CABINET)—

- established, 925 n, 976-978 n.
- relation of, to the President, 923, 924.
- appointments to office by heads of, 972.
- President may remove heads of, 988.

DEPORTATION—

- of aliens, 1457.

DEPOSITIONS—

- of deceased witness, admissible against accused under Sixth Amendment, 1484.

DEVENS, CHARLES, ATTORNEY GENERAL—

- on vacancies in recess of Congress, 990.

DEXTER, SAMUEL—

- on direct taxes, 178.

DICEY—

- on American Civil War, 1310 n.

DICKINSON, JOHN—

- author of address by first Colonial Congress to the King, 9 n.
- opposed the Declaration of Independence, 20.
- member of Committee on Articles of Confederation, 23, 1047 n.
- delegate to the Constitutional Convention, 58, 59.
- opposed annual election of representatives, 127.

References are to pages.

DICKINSON, JOHN (continued)—

- favored limiting suffrage to freeholders, 134.
- on resemblance of Senate to House of Lords, 226 n, 227 n, 229.
- favored revenue bills originating in House of Representatives, 347.
- on ex post facto laws, 776.
- member of Committee on Correspondence, 949 n.
- on election of President, 880.
- on removal of the President, 1027.
- on removal of judges, 1069.
- author of clause on formation of new States, 1249.
- on guarantee of republican form of government, 1285.
- member of Committee on Assumption of State debts, 1323 n.
- signed the Constitution, 1347.
- signed Articles of Confederation, 1698.

DIDEROT—

- on natural equality, 1631.

DILLON, JUDGE—

- life of John Marshall, 1012 n, 1017 n, 1023.

DIRECT TAXES—

- debate in Convention on, 170–174.
- to be apportioned according to population, 170, 171.
- history of provision for taking a census in connection with, 170, 171.
- alteration in report of Committees on Detail and Style concerning, 172, 173.
- suggestion by Washington to Convention on apportionment of, 173.
- five States in Convention opposed a, 174.
- Gallatin on meaning of, 175.
- levied only for war expenses, 176.
- French war tax, 176.
- for war of 1812, 176, 177.
- Civil War tax, 177.
- levied on carriages in 1794, 177.
- opposed by Sedgwick, 177, 178.
- Dexter on, 178.
- opposed by Madison, 179.
- Ames on, 179.
- tested in *Hylton v. United States*, 179–182.
- opinions on, in *Hylton v. United States*, of Chase, Paterson, Iredell and Wilson, 180–182.
- cases under Civil War taxes, 183–188.
- Pacific Insurance Co. v. Soule*, opinion on, of Swayne, Justice, in, 183.
- Veazie Bank v. Fenno*, opinion on, of Chase, Chief Justice, in, 184.

References are to pages.

DIRECT TAXES (continued)—

- Clifford, Justice, on succession tax in *Scholey v. Rew*, 186.
- Swayne, Justice, in *Springer v. United States*, on tax on real estate and slaves, 187.
- Kent on *Hylton v. United States*, 188.
- act of 1894 taxing incomes, considered, 188.
- opinion on, of Chief Justice Fuller in *Pollock v. Farmers Loan and Trust Company*, 188.
- tax on bonds considered, 189, 190.
- income tax held to be, 192.
- argument of Hamilton in *Hylton v. United States*, 193-196.
- Hamilton calls tax on carriages a direct tax, 194.
- Chief Justice Taney held tax on salaries of officers unlawful, 196.
- must be laid in proportion to population, 747.
- Hamilton on poll tax, 748, 749.

DIRECT VOTE FOR PRESIDENT—

- favored by Jefferson, 1577.
- opposed by Hamilton, 1579.

DISBARMENT FROM SUPREME COURT—

- for engaging in rebellion, unconstitutional, 744.

DISSERTATION ON UNION OF THE STATES—

- by Pelatiah Webster, 81 n.

DISTRICT ELECTIONS FOR ELECTORS—

- choice of electors by districts, 1557.
- favored by Hamilton, Gallatin, Wilson and Madison, 1558.
- intended by Constitutional Convention, 1558.
- Michigan district election act, sustained, 1568.

DISTRICT COURTS—

- creation of, 1054.

DISTRICT OF COLUMBIA—

- suits against Congressmen in, 318.
- District established, 695-699.
- ceded by Maryland and Virginia, 696.
- government of, 696.
- establishment of, urged by Mason and Madison, 695, 697.
- control of Congress over, 698.
- city charters in, 696.
- hospital funds in, 1389.
- courts of, 1066.
- park lands in, 1456.

DIVORCE—

- granted in Connecticut, challenged in New York, 1202.

References are to pages.

DOCK YARDS—

power of Congress over, 699-701.

DOLLAR—

made unit of account, 634.

inscription on, 1372 n.

DOMESTIC VIOLENCE—

definition of, 1294.

guarantee against, 1294.

Tyler on, 1295.

Roosevelt on, 1296, 1301.

DORR'S REBELLION—

Dorr punished for treason against a State, 1229.

punishment annulled, 1229-1231 n.

DOOLITTLE, J. R.—

on Civil Rights Bill, 1608.

DRAKE, CHARLES F.—

on impeachment of President Johnson, 216, 217.

DRAYTON, WILLIAM HENRY—

Articles of Confederation revised by, 849 n.

signed Articles of Confederation, 1698.

DRILL—

right of military company to, 694.

unlawful drilling, 1409.

DUANE, JAMES—

member of First Colonial Congress, 1.

Hamilton's letter to, 86.

member of Committee for Trial of Appeals, 1043.

signed Articles of Confederation, 1697.

DUCHE, REV. JACOB—

opened First Colonial Congress with prayer, 5 n.

described by John Adams, 5 n.

DUE PROCESS OF LAW—

considered, 1448, 1458.

Curtis, Justice, on, 1449.

defined, 1449, 1624, 1625.

means "law of the land," 1450.

not necessarily judicial process, 1451.

Cooley, Judge, on, 1451, 1452.

collection of taxes are, 1453.

executive orders, are, 1453.

deprivation of life without, 1454.

deprivation of liberty without, 1455.

References are to pages.

DUE PROCESS OF LAW (continued)—

deprivation of property without, 1455, 1456.
aliens and deportation under, 1458.
under Fourteenth Amendment, 1624-1630.
corporations producing books under, 1625.

DUEL—

trial by, 1137.

DUTCH MINISTER—

refused to obey subpoena, 319.

DUTIES—

under Articles of Confederation, 28.
power of Congress to lay and collect, 382-384.
defined by Wilson and Story, 386, 387.
defined by Tucker, Chase, Paterson, Swayne, 388.
defined by Monroe, 392-397.
States cannot levy without consent of Congress, 754, 834, 843.
when may be laid on imports or exports, 835, 837.
definitions of, 837.
when laid, proceeds for use of United States, 837.
of tonnage, can be laid when, 835, 837.

DYER, JUDGE—

on privileges of Congressmen, 314, 317.

DYER, ELIPHALET—

member of First Colonial Congress, 1.

DYING DECLARATIONS—

admissible under Sixth Amendment against accused, 1484.

E.

EAST INDIA COMPANY—

colonial boycott of, 7.

EDWARD III, 322, 342.

EDWARD THE CONFESSOR, 306, 307.

EDMUNDS, GEORGE F.—

on illegality of President Johnson's amnesty proclamation, 947.
conferee on Fifteenth Amendment, 1671.

EDDYSTONE LIGHT HOUSE—

Franklin's story of, 860 n.

EIGHTH AMENDMENT—

prohibits requirement of excessive bail, 1507-1509.
prohibits imposition of excessive fines, 1500, 1510.

References are to pages.

EIGHTH AMENDMENT (continued)—

- prohibits infliction of cruel or unusual punishments, 1510.
- what are not cruel or unusual punishments, 1511-1519.
- what are cruel or unusual punishments, 1519-1522.

ELECTROCUTION—

- not cruel punishment, 1513.

ELECTORAL COLLEGE (see ELECTORS).

ELECTORAL COMMISSION BILL, 1570.

ELECTORS, PRESIDENTIAL—

- proposed by Hamilton, 875.
- suggested that they be chosen by Congress, 880.
- debate on election of, 880-885.
- who not eligible as, 887.
- Congress fixes time of election of, 888.
- change in method of election of President by Twelfth Amendment, 1553.
- Gouverneur Morris opposed Twelfth Amendment, 1556-1558 n.
- Clinton author of Twelfth Amendment, 1556.
- chosen in 1796 by districts in many States, 1556.
- Hamilton, Gallatin and Wilson favor district system of electing, 1558.
- election of, by general ticket adopted in 1832, 1558.
- Madison on, 1558, 1560 n.
- failure to elect President by, throws choice into the House. 1559, 1562, 1564.
- election of, before the Twelfth Amendment, 1563, 1565.
- effect of Jefferson-Burr contest on, 1565-1569.
- not pledged to candidates by the Constitution, 1566, 1567.
- number of, 1567.
- defined, 1567.
- not officers of the United States, 1567.
- election of, by districts constitutional, 1568.
- election of Washington, Adams and Jefferson by, 1569.
- Justice Miller on, 1569, 1570 n.
- opening of electoral returns, 1570.
- Hayes-Tilden contest, 1570.
- Electoral Commission Bill, 1570.
- count of electoral votes, 1571.
- count of electoral votes at first election of Washington, 1571 n.
- electoral college a compromise, 1572.
- Roosevelt on decline of electoral college, 1572, 1573.
- party caucuses in relation to, 1573, 1575.
- national conventions in relation to, 1575-1577.

*References are to pages.***ELECTORS, PRESIDENTIAL** (continued)—

Jefferson and Sumner opposed the electoral college, 1579.

Story on, 1580.

Gregg on, 1580 n.

ELECTIONS—

when qualifications of voters left to States, 1610, 1617.

ELECTION OF REPRESENTATIVES—

Congress has control of, 270-283.

time, place and manner of, 270-274.

opposition of Henry and Monroe to, 271, 272.

each house, judge of election of its members, 280-283.

ELECTION OF SENATORS—

time, place and manner prescribed by the State legislature, 270-284.

ELECTION OF PRESIDENT (see **ELECTORS**)—

Miller on election of, 870 n.

ELEVENTH AMENDMENT—

history of the, 1535-1539.

delay in ratifying, 1539.

why a suit against a State is prohibited, 1535-1542.

scope of the amendment, 1542-1546.

when a suit is against a State, 1546.

when a suit is not against a State, 1546.

Madison on, 1550 n.

ELLERY, WILLIAM—

member of committee to try appeals in captures, 1043.

signed Articles of Confederation, 1697.

ELLSWORTH, OLIVER—

delegate to Constitutional Convention, 58.

did not sign Constitution, 65.

member of Committee of Detail, 76, 233.

favoured annual elections for Representatives, 126, 127.

favoured general suffrage for Representatives, 133, 134.

on direct taxes, 183 n.

member of first Senate, 225.

favoured one vote for each State in Senate, 232.

on compensation of Congressmen, 304.

opposed issuance of paper money, 411.

on regulation of commerce, 461.

author of piracy clause in Constitution, 673.

opposed export taxes, 749.

member of committee to propose title for President, 852 n.

on electors, 877, 878, 879.

References are to pages.

ELLSWORTH, OLIVER (continued)—

- on property qualifications for President, 890 n.
- appointed Chief Justice of U. S. Supreme Court, 1054 n.
- author of Judiciary Act of September 24, 1789, 1055 n.
- on appeals, 1128.
- on courts annulling laws, 1175.
- moved to refer Constitution to legislatures for ratification, 1341.
- on counting of first electoral vote, 1571, 1572.

ELMER, JONATHAN—

- member of first Senate, 225.
- opposed Senate passing on removals from office, 978.

EMANCIPATION PROCLAMATION OF PRESIDENT LINCOLN—

- a war measure, 913 n.

EMINENT DOMAIN, GOVERNMENT'S, POWER OF—

- over post office sites, 651.
- over land purchased for United States, 700.

EMMONS, JUDGE—

- on abolition of slavery by Thirteenth Amendment, 1586, 1591.

EMOLUMENT—

- acceptance of, from foreign states and princes by officers of the United States prohibited without the consent of Congress, 759.
- President not to receive any in addition to his compensation, 903, 907.
- definition of, 907.

ENEMY OF UNITED STATES—

- aid and comfort to, 1150, 1151.
- defined, 1153.

ENTRY—

- ports of, 752, 753.

ENROLLED BILLS—

- recognized as laws, 297, 298.

EPISCOPAL CHURCH—

- effort to establish in Virginia, 1376.
- Jefferson drew Act establishing religious freedom in Virginia, 1379, 1380.
- Madison vetoed bill to incorporate a church in Alexandria, 1381.

EQUAL RIGHTS—

- guaranteed to new States, 1248-1250.

EQUAL POWER IN SENATE—

- guaranteed to States, 1307.

References are to pages.

EQUAL PROTECTION OF THE LAWS—

guaranteed by Fourteenth Amendment, 1630, 1649.
 doctrine first recognized by Seneca, 1630.
 Sumner on, 1631, 1632.
 Diderot and D'Alembert on, 1631, 1632.
 Declaration of Independence and, 1632.
 Miller, Justice, on, 1633.
 purpose of clause, 1634.
 Field, Justice, on equality, 1635.
 persons include corporations under, 1635, 1636.
 challenge of grand jury in capital cases under, 1637.
 taxation under, 1638.
 relief from State taxation in federal courts under, 1638.
 Bradley, Justice, on, 1639.
 equal taxation not meant by, 1639.
 taxation classified under, 1640, 1641.
 classification of property under, 1640, 1641.
 inheritance tax under, 1642.
 criminal trials with jury less than twelve under, 1642, 1643.
 Field, Justice, on, 1641-1648.
 special laws concerning juries under, 1645.
 exceptions to amendment under, 1646, 1647.
 meaning of, 1644.
 McKenna, Justice, on qualifications of negro voters under, 1648, 1649.

EQUITY—

in federal courts, 1084, 1089-1092.
 jury trial not a proceeding in, 1496.

ESSEX, EARL OF, 219-222.

ESTABLISHMENT OF JUSTICE—

one of the objects of the Constitution, 100.

ESTERLINE, BLACKBURN—

on laws annulled by federal courts, 1192.

EUNDO—

privilege of, 311.

EVIDENCE—

Chief Justice passes on, at impeachment trial of President, 216, 217.
 irregularly obtained, when may be used, 1428.
 against oneself, what is, 1447.

EXCISES—

power to lay and collect, 382-384.

References are to pages.

EXCISES (continued)—

definition of, 386-388-389.

Monroe on, 392-397.

EXCUSING SENATORS FROM ATTENDING IMPEACHMENT TRIAL, 220.

EXECUTIVE CLERK OF THE SENATE, 255.

EXECUTIVE COUNCIL—

in Franklin's Plan, 22.

appointed by Colonial Congress, 231 n.

EXECUTIVE DEPARTMENT (see PRESIDENT)—

not provided for by Articles of Confederation, 850.

difficulty in establishing, 850-853.

Madison on, 853 n.

various names suggested for the Executive, 850, 851.

single executive proposed by Wilson and Pinckney, 855.

Calhoun advocated dual executive, 857 n.

St. George Tucker favored an executive from each State, 859 n.

Jefferson and Hamilton opposed plural executive, 859-861 n.

term of executive, 867-870.

EXECUTIVE ORDERS—

may be due process of law, 1453.

EXECUTIVE POWER—

when may be delegated, 871, 872.

danger from tyranny of, 1362.

EXEMPTION STATUTES AND OBLIGATION OF CONTRACTS, 799, 800.

EXPANSION OF NATIONAL TERRITORY—

not provided for in Constitution, 1252.

acquisition of national territory, 1252.

acquisition of Texas, 1253-1255.

acquisition by purchase, treaty or discovery, 1263.

Chase, Chief Justice, on government of new territory, 1263.

acquisition of Louisiana, 1265-1269.

government of annexed territory, 1270-1280.

Brown, Justice, on expansion, 1270.

Mexican cessions acquired by treaty, 1271.

Taney, Chief Justice, on, 1273.

Brown, Justice, on, 1270.

White, Justice, on, 1276.

Gray, Justice, on, 1277.

Day, Justice, on, 1278.

References are to pages.

EXPIRATION OF CONGRESS, 278.

EXPORTS—

- what are, 837, 838.
- apply only to property, 839.

EXPORT TAXES—

- Congress forbidden to levy, 749.
- views of Madison on, 750.
- States forbidden to levy, 834-841.
- a corpse not subject to export duty, 830.

EX POST FACTO LAWS—

- forbidden, 733.
- Mason and Wilson on, 734.
- Madison on, 734.
- definition of, 739-742.
- Washington, Justice, on, 741.
- Miller, Justice, on, 745.
- not applicable in civil cases, 776.

EXPRESS POWERS—

- of Congress, 381, 704.
- relative to bills of credit, 427.
- opinions of Marshall and Andrews on, 1626.
- under Fourteenth Amendment, 1659-1661.

EXPULSION FROM CONGRESS, 288, 289.

- debated in Convention, 290.

EXTRADITION—

- definition of, by Gray, Justice, 1231.
- definition of by Wharton, 1232.
- by treaty, 1232, 1233, 1236, 1240.
- between States, 1235-1237-1239.
- under federal laws, 1235.
- procedure under, 1238-1241.

EXTRAORDINARY SESSIONS OF CONGRESS—

- called by President, 1001.

EXTORTION IN PENNSYLVANIA—

- through veto power, 357.

F.

FARRAR ON THE CONSTITUTION, 92, 132, 722, 738, 893 n, 1353 n.

FARRAND, MAX—

- on power of President, 855 n.

References are to pages.

FARRAND, MAX (continued)—

- on election of President, 885 n.
- on first annulment of laws, 1180 n.

FEDERAL BUILDINGS—

- power of Congress over, 699, 701.

FEDERAL COURTS—

- established by Congress, 667.
- courts prior to the Federal Constitution, 1039-1050.
- committees of Congress heard prize and admiralty cases, 1039-1042.
- established by Congress at Washington's request, 1039.
- standing committees acted as, 1043.
- Court of Appeals for captures established, 1043-1045.
- under the Articles of Confederation, 1048.
- created under Constitution by Act of September 4, 1789, 1054 n.
- Wilson's speech in Pennsylvania Convention on the establishment of the federal judiciary, 1160 n.

FEDERAL EXECUTIVE—

- name of President in Paterson's plan of a Constitution, 251.

FEDERAL LAWS ON MILITIA, 690.

FEDERALISTS—

- favored liberal construction of Constitution, 94 n.
- reduced number of Supreme Court justices, 1077.
- Gerry on Federalists and Anti-Federalists, in State conventions, 1374.

FEDERALIST, THE (H.—written by Hamilton; M.—by Madison)—

- No. 40 M. objections to the Constitution, 54-57.
- No. 22 H. lack of a judiciary under the Confederation, 100, 101.
- No. 23 H. defense clause in Preamble, 102.
- No. 22 H. two Houses of Congress, 122, 123.
- No. 53 H. two-year term for Representatives, 129, 130.
- No. 39 M. House of Representatives, 132.
- No. 52 H. right of suffrage, 137, 138.
- No. 52 H. qualifications of representatives, 160.
- No. 68 H. Vice-President and Senate, 251.
- No. 65 H. impeachments, 257-261.
- No. 73 H. veto clause, 353, 354, 361 n.
- No. 33. H. power of Congress, 384.
- No. 7 H. trade of the States, 462.
- No. 42 M. naturalization, 613-615.
- No. 32 H. naturalization, 616.

References are to pages.

FEDERALIST, THE (continued)—

- No. 42 M. bankruptcy, 631; coinage, 638; weights, 639; post roads, 642, 643.
- No. 43 M. copyright, 659.
- No. 42 M. piracy, 674.
- No. 26 H. standing army, 685.
- No. 29 H. militia, 692.
- No. 43 M. seat of government, 697, 698; government property, 700.
- No. 33 H. necessary and proper powers, 702, 704.
- No. 44 M. bills of credit, 765; contracts, 780.
- No. 69 H. President and King, 863.
- No. 73 H. compensation of President, 906.
- No. 76 H. appointing power of President, 969.
- No. 77 H. power of removal from office, 975.
- No. 22 H. judicial power, 1050.
- No. 81 H. on inferior courts, 1063-1065.
- No. 78 H. on tenure of judges, 1071.
- No. 79 H. compensation of judges, 1080.
- No. 80 H. maritime causes, 1102.
- No. 81 H. original jurisdiction of Supreme Court, 1124.
- No. 82 H. appellate jurisdiction of Supreme Court, 1129.
- No. 78 H. power of courts to annul laws, 1176.
- No. 42 M. full faith and credit, 1193.
- No. 43 M. admission of new States, 1253; guarantee of a republican form of government, 1286; domestic violence, 1293-1295; equal votes in Senate, 1307.
- No. 43 M. debts of the United States, 1324.
- No. 44 M. supreme law of the land, 1327, 1328.
- No. 33 H. supreme law of the land, 1330.
- No. 43 M. ratification of the Constitution, 1342-1344.
- No. 84 H. bill of rights, 1354-1357, 1523.
- No. 83 H. omission of jury trial in civil cases, 1501-1504 n.
- No. 81 H. suits against States, 1536.
- No. 68 H. against direct vote for President, 1577-1579.

FEDERATION OF LABOR TRUST CASE, LOEWE v. LAWLER, 594.

FELONIES ON HIGH SEAS—

punishable by Congress, 670-676.

FELONY—

excepted from privilege of Congressmen, 308.

FERDINAND AND ISABELLA, 1486.

*References are to pages.***FESSENDEN, WILLIAM P.—**

on the Fourteenth Amendment, 1597, 1601.

FEW, WILLIAM—

delegate to Constitutional Convention, 59.

member of first Senate, 225.

favoured Senate passing on removals from office, 978 n.

signed Constitution, 1350, 1771.

FIELD, JUSTICE—

on responsibility of judges to private parties, 328.

on legal tender, 451.

on commerce powers, 475, 493.

on insurance, 520.

on corporations, 574.

on post roads, 649.

on high seas, 676.

on Congress and the army, 686.

on government buildings and eminent domain, 700, 701.

on ex post facto laws, 744.

on obligation of contracts, 796, 815.

on compacts between States, 846.

on cases and controversies, 1106.

on levying war, 1146.

on attainder of treason, 1156.

on rights of citizens in other States, 1216.

on bigamy and polygamy, 1386.

on cruel punishments, 1511, 1518.

on equal protection of the laws, 1635.

on classification of property for taxation, 1641.

FIFTEENTH AMENDMENT—

history of the, 1667-1671.

last of Civil War amendments, 1671.

did not confer suffrage, 1671-1675.

prevents discrimination in suffrage, 1671, 1672.

created a new constitutional right, 1672.

eliminated the word "white" from State constitutions in reference to suffrage, 1674.

Cooley on the, 1674 n.

FIFTH AMENDMENT—

history of the, 1433.

not applicable to consular courts, 1434.

what is jeopardy, 1437.

when is one in jeopardy, 1437.

*References are to pages.***FIFTH AMENDMENT (continued)—**

- what does not amount to being twice in jeopardy, 1438-1442.
- one cannot be compelled to testify against himself, 1442-1444.
- the privilege extends to grand jury investigations, 1444.
- exceptions to the privilege, 1445, 1446.
- purpose of the, 1447.
- deprivation of life without due process under, 1453, 1454.
- deprivation of liberty without due process under, 1454, 1455.
- deprivation of property without due process under, 1455-1459.
- liberty defined under, 1455.
- private property cannot be taken for public use without just compensation, 1458-1463.
- what is taking private property, 1463-1465.
- what is not taking private property, 1465-1469.
- what is just compensation under, 1469-1470.

FILLMORE, MILLARD—

- number of vetoes by, as President, 376.
- succeeded Taylor as President, 896.
- absences from capital while President, 1011 n.

FINES—

- President's power to pardon for, 940-944.
- excessive prohibited, 1505-1509.

FIRST AMENDMENT—

- prohibits Congress from making any law respecting an establishment of religion, 1372-1376.
- establishment, definition of, under, 1375 n.
- prohibits Congress from abridging the freedom of speech or of the press, 1372-1379-1402.
- rejected by the Senate, inserted at request of House, 1375 n.
- prohibits Congress from abridging the right of the people to assemble and petition the government, 1372-1406-1408.
- federal decisions respecting religion under, 1384.
- religion not a defense for crime under, 1387.
- religion not a declared object of government under, 1391.
- constitutions of the original States on religious liberty, 1398-1399 n.
- what is freedom of speech, 1402-1404.
- what is freedom of the press, 1413, 1414.
- what is not an abridgment of the freedom of speech and of the press, 1404, 1405.
- what is the right to assemble and petition, 1407.
- power of the States to regulate the right to assemble and petition, 1406-1408.

References are to pages.

FISH, HAMILTON, SECRETARY OF STATE—

certified ratification of the Fifteenth Amendment, 1667.

FISHER, SIDNEY G.—

on first Senate, 224, 225, 227.

on revenue bills, 343.

on origin of obligation of contracts, 778.

on militia, 913.

on amendment of charters in the Colonies, 1302.

FITZSIMONS, THOMAS—

delegate to Constitutional Convention, 62.

signed Constitution, 1347, 1770.

FIVE GREAT COMMERCIAL INTERESTS OF THE COLONIES—

Charles Pinckney on, 463.

FLAG, NATIONAL—

advertisements on forbidden, 543.

FLIES—

hasten adoption of Declaration of Independence, 19.

FLOYD, WILLIAM—

member of First Colonial Congress, 1.

FOLSOM, NICHOLAS—

member of First Colonial Congress, 1.

FOREIGN ATTACK—

power to repel, 691.

FOREIGN CORPORATIONS—

power of States over, 543-547, 817.

FOREIGN PRODUCTS—

States cannot discriminate against, 547.

FOREIGNERS (see ALIENS AND NATURALIZATION).

FOREIGN AFFAIRS—

department of proposed, 976-978.

FOREIGN BORN CITIZEN—

cannot become President, 888-891.

FOREIGN COMMERCE—

under Colonies, 454.

under Constitution, 453-478.

References are to pages.

FORFEITURE FOR TREASON—

prohibited, 1157.

FORTESCUE, SIR JOHN—

on privilege of Commons, 306.

FORTS—

power of Congress over, 699-701.

FOSTER, ROGER—

on impeachment, 1033, 1034.

FOUR SOURCES OF THE CONSTITUTION, 77 n.

FOUR CLASSES OF GOVERNMENTAL POWERS—

Swayne Justice, on, 490, 491.

FOURTH OF MARCH—

beginning of congressional term, 278 n.

FOURTH AMENDMENT (see SEARCHES AND SEIZURES)—

prohibits unreasonable searches and seizures, 1414.

prevents the issuance of warrants, except for probable cause, 1414.

warrants must be issued on oath or affirmation under the, 1424.

what is an unreasonable search or seizure under the, 1424.

what amounts to probable cause under the, 1425.

when the production of books violates the, 1426.

when it does not, 1426, 1427.

arrest, when justified under the, 1427.

investigations by congressional committees under the, 1428.

by the interstate commerce commission under the, 1428.

aliens entitled to the benefit of the, 1429.

Congress cannot deprive the people of the benefit of the, 1430.

provisions of the amendment apply to the territories, 1430.

FOURTEENTH AMENDMENT—

enacted for relief of the freedmen, 1594.

history of the, 1595.

condition of freedmen before enactment of the, 1596.

reconstruction committee named in Congress, 1597, 1598.

Stevens amendment reported, 1598.

Garfield's amendment defeated, 1599.

naturalization under the, 1600 n.

passage of the, 1603, 1604.

called Magna Charta of American liberty, 1605 n.

reversed Dred Scott decision, 1606.

judicial construction of the, 1608, 1609.

Hannis Taylor on the, 1610 n.

defined citizenship in the United States and States, 1604-1611.

*References are to pages.***FOURTEENTH AMENDMENT (continued)—**

- privileges and immunities under the, 1611.
- purpose of first section of the, 1613.
- citizens of State and Nation under the, 1614.
- effect of on foreigners, 1615.
- naturalization and qualification of voters under the, 1615.
- sources of citizenship under the, 1618.
- privileges and immunities of federal citizens under the, 1621.
- State prohibitions under the, 1621, 1624.
- what action by a State amounts to a denial of privileges and immunities of citizens under the, 1622, 1623.
- due process of law under the, 1624-1630.
- due process considered, 1624, 1625.
- liberty defined under the, 1625, 1626.
- habeas corpus under the, 1628.
- hours of labor for women under the, 1629.
- indeterminate sentences under the, 1630.
- insurance combinations under the, 1630.
- compulsion of witnesses under the, 1630.
- "equal protection of the laws" granted by the, 1630.
- equality in the Declaration of Independence under the, 1632.
- "equal protection of the laws" construed, 1633-1635.
- corporations included under "person" in the, 1636.
- challenge of grand jurors under the, 1637.
- jury less than twelve under the, 1642.
- apportionment of representatives under the, 1650, 1651.
- when basis of representation may be reduced under the, 1651-1653.
- views of Keifer on the, 1651.
- State tests of suffrage under the, 1652, 1653.
- Crumpacker on reduction of representation by Congress under the, 1653.
- Wise on abridgement of suffrage under the, 1653.
- Howard on ambiguity of "abridge" under the, 1653 n.
- punishment under the, for having engaged in rebellion, 1654.
- Jefferson Davis pleaded the amendment as a bar to his prosecution for treason, 1655, 1656.
- prohibits questioning the validity of the public debt, 1657.
- obligations incurred in aid of rebellion or claims for loss of slaves shall not be paid under the, 1657-1659.
- power of Congress to enforce the, 1659, 1660.
- what Congress may protect under the, 1662.
- when Congress may not act under the, 1662-1665.
- does not authorize Congress to legislate concerning subjects within State control, 1665.
- Thaddeus Stevens and the amendment, 1665 n.

References are to pages.

FRAMERS OF THE CONSTITUTION, 58-64, 1348—

Franklin the oldest and Dayton the youngest, 64.
 six signers of the Declaration of Independence among the, 64.
 Baldwin's account of the, 1348.
 instructions of States to the, 46-48.
 in first Senate, 225.

FRANCE—

Louisiana purchased from, 1265.
 directory of, a warning against plural presidency, 860 n.
 treaties with, 949.
 provision in code of, on compensation of property, 1459.

FRANCHISES—

considered, 806, 807.
 Charles River Bridge case, 808.
 power to change terms of, 817-822.

FRANKLIN, BENJAMIN—

first Postmaster General of the United States, 12.
 member of Committee on Independence, 13-16, 17 n.
 plan for union of, 21, 22, 848.
 delegate to Constitutional Convention, 57, 62.
 signed Declaration of Independence, 64.
 member of Committee of Eleven, 76, 233 n.
 opposed limiting suffrage to freeholders, 136.
 on compensation of Senators, 304.
 opposed the veto clause of the Constitution, 357, 358.
 favored publicity of accounts, 756.
 opposed property qualifications for President and members of Congress, 890 n.
 opposed compensation for President, 903-906.
 on appointments by the President, 967.
 member of Committee on Judiciary in first Colonial Congress, 1040 n.
 signed Constitution, 1347.
 text of plan for union by, 1684.

FRAUD—

debts involving moral turpitude not dischargeable in bankruptcy, 632.

FRAZIERS, JUDGE—

impeachment of, 1037 n.

FREEDMEN—

protected by Fourteenth Amendment, 1594.
 hardships of, 1595, 1596.

References are to pages.

FREEDOM OF THE PRESS—

guaranteed, 1371, 1374, 1375, 1399.
 what is, 1401, 1402.
 Massachusetts censors on, 1400.
 history of, 1399, 1400.
 English law on, 1402.
 Cooley on, 1402, 1403.

FREEDOM OF SPEECH—

guaranteed in Congress, 322.
 under Colonies and Articles of Confederation, 28, 324, 325.
 Miller, Justice, on, 327.
 Tucker on, 328.
 Story, Justice, on, 329.
 guaranteed to citizens, 1371, 1374, 1375, 1399.
 speaking in parks, 1403.
 Fuller, Chief Justice, on, 1404.

FREEHOLDERS—

efforts in Convention to limit suffrage to, 133-137, 145.

FREIGHT RATE DECISIONS, 584 (see RAILWAYS).

FRONTINUS—

on condemnation of land, 1458.

FUGITIVE SLAVES—

debate in Convention on, 1241, 1244.

FUGITIVES, SURRENDER OF—

New England Confederation on, 1222.
 debate in Convention on, 1223.
 Pinckney, author of clause concerning, 1223.
 extradition, definition of, 1231.
 fugitive defined, 1232.

FULL FAITH AND CREDIT—

under the Articles of Confederation, 27, 1193.
 under the Colonies, 1193.
 guaranteed between the States, 1193, 1204.
 given to records and judicial proceedings of States, 1197.
 inquiry by courts concerning, 1198.
 clause on, attributed to Gouverneur Morris, 1193-1195.

FULLER, CHIEF JUSTICE—

on the Preamble to the Constitution, 92.
 on annexation of Texas and citizenship, 153.
 on direct taxes, 189, 192.
 on investigations by Congress, 287.

*References are to pages.***FULLER, CHIEF JUSTICE (continued)—**

- on federal control of sugar refining, 525.
- on tax on railroad receipts, 551.
- on State inspection laws, 565.
- on naturalization, 620, 621.
- on controversies, 1108.
- on appeals, 1128.
- on freedom of speech, 1403.
- on presence of defendant in court, 1454.
- on riparian rights, 1465.
- on death penalty, 1518.
- on electors chosen by districts, 1568.

G.**GABEL—**

- a form of tax, 386.

GADSDEN, CHRISTOPHER—

- in first Colonial Congress, 2.

GALLATIN, ALBERT—

- on direct taxes, 175, 176.
- denied seat in Senate, 248.
- letters to Jefferson on compensation of Congressmen, 302, 303 n.
- on admission of Texas, 1255.
- on annexation of Louisiana, 1266.
- on the Eleventh Amendment, 1535, 1539.
- on choice of electors by districts, 1558.

GALE—

- member of committee to prepare amendments, 1365 n.

GALLOWAY, JOSEPH—

- in First Colonial Congress, 2.
- plan of union by, 10, 11.
- his "Reflections," 11 n.

GARFIELD, JAMES A.—

- veto power not exercised by, as President, 376.
- anti-trust bill introduced in Congress by, 581, 583.
- on excluding Confederates from holding office, 1599.

GARLAND, AUGUSTUS H., ATTORNEY GENERAL—

- on telephone and telegraph companies, 509, 744, 745.

GASTON, JUDGE—

- on citizenship under King and Constitution, 150.

References are to pages.

GENERAL ORDER IN NAVY, 688.

GENERAL WELFARE—

- meaning of, 103.
- power of Congress to provide for, 103.
- Hamilton on, 391, 392.
- St. George Tucker on, 392.
- Monroe on, 393.
- Story on, 397.

GEORGE III—

- address to by Colonial Congress, 6-15, 77 n.

GEORGIA—

- not represented in first Colonial Congress, 1.
- instructed delegates to Constitutional Convention, 47.
- first Senators from, 225.
- governor of, commander in chief of army and navy of, 912.
- ceded western lands to the United States, 1259.
- ratified Constitution, 1345.
- religious freedom in, 1398 n.
- freedom of press in, 1405 n.

GERRY, ELBRIDGE—

- member of Colonial Congress, 26 n.
- delegate to Constitutional Convention, 60, 61.
- declined to sign Constitution, 65.
- member of Committee of Eleven, 76, 233 n.
- favored annual elections for Representatives in Congress, 126.
- opposed election of Representatives by the people, 131.
- on election of Senators, 228.
- favored revenue bills originating in Senate, 252.
- subsequently favored such bills originating in House of Representatives, 344-346.
- author of veto clause in Constitution, 357, 359, 360.
- opposed a standing army, 685.
- on location of seat of government, 696.
- author of attainder and ex post facto clause in Constitution, 733.
- on forbidding Congress to impair contracts, 832.
- favored long term for President, 869.
- moved election of President by governors of States, 875-877.
- favored impeachment clause, 1029.
- on oath of office, 1332-1335.
- moved for a bill of rights in the Constitution, 1353.
- described the Rats and Anti-Rats, 1373, 1374 n.

References are to pages.

GETTYSBURG PARK—

taking of land for, 1468.

GIBSON, CHIEF JUSTICE—

on power of courts to annul laws, 1183 n.

GIFTS—

acceptance of from foreign states by officials of United States
without consent of Congress, forbidden, 759-762.

to departing ambassadors, 761 n.

Jefferson accepted gift from Czar Alexander while President, 762 n.

GILES, WILLIAM B.—

letter from Jefferson to, 963.

GILMAN, NICHOLAS—

delegate to Convention, 59.

signed the Constitution, 1346, 1770.

member of committee to prepare amendments, 1365 n.

GLADSTONE AND IRISH CHURCH BILL, 355 n.

GOLD—

value of, considered in Legal Tender Cases, 416, 462.

scarcity of, during Civil War, 431, 432.

standard of coinage, 466 n.

GOLDSBOROUGH, ROBERT—

in first Colonial Congress, 2.

GOOD BEHAVIOR—

tenure during, proposed for Senators by Hamilton, 247 n.

tenure of, for President proposed, 868.

tenure of, established for federal judges, 1069.

in England, 1070.

Hamilton's views on, 1071.

defined, 1071-1075.

Choate on, 1076, 1077 n.

Act of Settlement on, 1076 n.

GOODLOE—

member of committee to prepare amendments, 1365 n.

GOODS—

when in transit, 540-542.

GORDON, THOMAS F.—

on origin of caucus, 1574, 1575 n.

References are to pages.

GORHAM, NATHANIEL—

delegate to Constitutional Convention, 60.
member of Committee of Detail, 76, 77.
feared dissolution of the Union, 99.
moved thirty thousand as number for apportionment for Representatives, 172.
President of Colonial Congress, 206.
suggested length of senatorial term, 231.
debates on paper money, 410, 411, 413.
favored establishment of inferior federal courts. 669.
on protecting States against rebellion, 1284.
signed Constitution, 1346, 1770.

GOVERNMENTAL POWERS—

danger of, 1358.
effect of on liberty, 1359.

GOVERNOR—

Hamilton's name for "President" in his plan for a Constitution, 851.

GOVERNOR'S COUNCIL—

evolution of, 224.

GOVERNORS OF COLONIES—

vetoed by, 355.

GOVERNORS OF STATES—

when to fill vacancies in House of Representatives, 199, 200.
when to fill vacancies in Senate, 243, 246.

GRAND COMMITTEE ON ASSUMPTION OF STATE DEBTS BY UNITED STATES, 1323 n.

GRAND COUNCIL—

in Galloway's plan, 10.

GRAND JURY—

criminal prosecutions must be by, 143.
challenge of, 1637.

GRANT, ULYSSES S.—

vetoed by, 376.
suggestions as to veto power, 376 n.
messages on railway rates, 581.
absences from capital while President, 1006 n.
testified in Babcock trial, 1025.
on sectarian tenets in schools, 1398.

References are to pages.

GRANTS OF POWER—

by Constitution, 114-118.
to Congress, 381, 409.

GRAY, JUSTICE—

on legal tender, 449, 452.
on regulation of trains, 555.
on controversies between States, 1116.
on crimes, 1140.
on jury trial, 1142.
on extradition, 1231.
on citizenship of negroes, 1613.
on sources of citizenship, 1617-1620.
on implied powers of Congress, 1660.

GRAYSON, WILLIAM—

member of second Colonial Congress, 32.
member of first Senate, 225.
favored Senate passing on removals from office, 978 n.
member of Committee on Appeals, 1045.
opposed provision allowing increase in compensation of judges,
1079 n.

GREAT BRITAIN—

address to people of by first Colonial Congress, 6, 7.

GREAT LAKES—

held to be high seas, 675, 676.

GREAT NORTHERN RAILWAY—

suits against, 589-592.

GREENBACKS—

denied to be legal tender in *Hepburn v. Griswold*, 416-435.
sustained as legal tender in later cases, 435-447, 448.

GREGORY, POPE, 1487 n.

GREY, LADY JANE, 219.

GRIDDER, HENRY—

member of Reconstruction Committee, 1597.

GRIER, JUSTICE—

on privileges of Congressmen, 314-318.
on resistance against invasion, 691.
on suing a county, 1119.

GRIFFIN, CYRUS—

President of second Colonial Congress, 207.
 commissioner on Pennsylvania-Connecticut dispute, 1049.

GRIMES, JAMES W.—

member of Reconstruction Committee, 1597.

GRIMKE—

Pinckney's letter to, 70 n.

GROSSCUP, JUDGE—

on insurrection, 690, 1656.

GROTIUS—

on prizes, 682.
 on fugitives, 1233 n.
 on private property and confiscation, 1460.

GROW, GALUSHA A.—

Speaker of the House of Representatives, 205.

GUARANTEE OF REPUBLICAN FORM OF GOVERNMENT—

by the United States, 1282, 1292.

GUNN, JAMES—

member of first Senate, 225.
 favored Senate passing on removals from office, 978.

GUTHRIE, WILLIAM D.—

on Fourteenth Amendment, 1606-1613.

GWINNETT, BUTTON—

signer of Declaration of Independence, 23.
 member of committee on Articles of Confederation, 1047.

H.**HABEAS CORPUS—**

power of Congress to suspend writ of, 670, 721.
 history of, 721.
 history of in Constitutional Convention, 722, 723.
 Pinckney and Gouverneur Morris authors of clause concerning,
 722, 723.
 meaning of writ of, 723, 724.
 suspension of writ of, 724.
 opinions on suspension of writ of, 724-726.
 Leavitt, Judge, on, in Vallandigham case, 726.
 Davis, Justice, on, in Milligan case, 727-729.
 suspension of writ during Whisky Insurrection in Pennsylvania,
 731.

References are to pages.

HABEAS CORPUS (continued)—

- Burr conspiracy and suspension of writ of, 731 n.
- suspension of writ of, by General Jackson in Florida, 733.
- suspension of writ of, by Governor of Washington Territory, 733.
- suspension of writ of, by Confederate States, 733.
- suspension of writ of, by Governor of Massachusetts in Shays' Rebellion, 733.
- Madison on suspension of writ of, 1360.
- under Fourteenth Amendment, 1628.

HABITUAL CRIMINAL LAW—

- enforcement of, not cruel punishment, 1512.

HALIFAX, LORD—

- impeachment of, 219.

HALIFAX, MARQUIS OF—

- Speaker of the House of Lords, 1505 n.

HALL, JUDGE—

- on original packages, 516.
- on habeas corpus, 725.

HALLAM—

- on habeas corpus, 722 n.
- on origin of jury trial, 1498.

HALLECK—

- on habeas corpus, 728, 733.

HAMILTON, ALEXANDER—

- on the decline of talent in second Colonial Congress, 26 n.
- delegate to Constitutional Convention, 61, 64.
- presented plan of a Constitution to Convention, 75, 1712, 1726.
- probably the first to suggest a Constitution, 86 n.
- on defects of Articles of Confederation, 86, 99.
- Hannis Taylor on Hamilton's letter suggesting a Constitution, 86 n.
- member of Committee on Style, 90.
- Preamble ascribed to, 91.
- on the establishment of the judiciary, 100.
- on the objects of union, 103.
- avored two houses of Congress, 122, 133.
- called the House of Representatives "The Assembly," 125, 130.
- avored a three-year term for Representatives, 129.
- on biennial elections, 130.
- on right of suffrage, 137.
- counsel in *Hylton v. United States*, 183.
- proposed life term and property qualifications for Senators, 247 n.

References are to pages.

HAMILTON, ALEXANDER (continued)—

- on Vice-President and Senate, 251.
- on impeachments, 257.
- on Congressmen holding other offices, 331.
- on origin of veto clause, 353 n.
- on veto power, 361 n.
- on powers of Congress, 383 n, 384.
- report of, as Secretary of the Treasury on manufacturers, 391.
- on taxing power and duties, 391.
- on State discrimination over trade and federal regulation thereof, 462, 472.
- report of, on a national bank, 573.
- avored Senate declaring war, 677.
- on standing armies, 685.
- on the militia, 692.
- on necessary and proper laws, 702.
- defined legislative powers, 703.
- on necessary powers of Congress, 713 n.
- on poll taxes, 748.
- on titles of nobility, 758.
- called "President" "Governor" in his plan of a Constitution, 861.
- on single executive, 861 n, 884.
- proposed "Good Behavior" for President's term, 868.
- on vacancy in Presidency, 875 n.
- speech on election of President, 885.
- on treaty power, 950, 954-955.
- advised Washington concerning Jay treaty papers, 959.
- on appointments by President, 969.
- on removal from office by President, 975.
- credited by Van Buren with authorship of Judiciary Act of 1789, 1055 n.
- on inferior courts, 1063, 1065.
- on tenure of judges, 1071.
- on compensation of judges, 1080.
- on maritime law, 1102.
- on original jurisdiction of Supreme Court, 1123.
- on Federal and State Courts, 1130.
- on power of courts to annul laws, 1176.
- on provision for amendments to Constitution, 1305.
- urged Virginia to ratify the Constitution, 1315.
- on the "law of the land," 1329.
- on treaties as the "supreme law of the land," 1330.
- on religious tests, 1338 n.
- signed Constitution, 1346.
- on a bill of rights, 1354-1357.

References are to pages.

HAMILTON, ALEXANDER (continued)—

- on omission of provision for jury trial in civil cases, 1501 n.
- opposed inserting a bill of rights in the Constitution, 1523.
- on suits against States, 1536.
- on choosing electors by districts, 1577.
- first to use term "electors," 1562.
- speech of, when submitting plan for a Constitution, 1726-1737.

HANCOCK, JOHN—

- first President of second Colonial Congress, 206 n, 206.
- signed Articles of Confederation, 1697.

HANSON, JOHN—

- President of second Colonial Congress, 206.
- signed Articles of Confederation, 1698.

"HAPPEN"—

- meaning of in the Constitution, 202.

HARBORS—

- tonnage fees for, 836, 837.

HARDY, JUDGE—

- impeachment of, 1037 n.

HARE—

- on naturalization, 1617, 1618.

HARLAN, JUSTICE—

- on Preamble to the Constitution, 92.
- on delegation of legislative power, 118.
- on revenue bills, 351.
- on President signing bills, 369.
- on Federal regulation of lotteries, 476, 528, 529.
- on power of Congress over commerce, 485.
- on telephones in commerce, 509.
- on trade with Indians, 518.
- on power of the State to create corporations, 548.
- on holding companies, 548.
- on stoppage of trains, 556.
- on the powers of Congress, 711.
- on tax on imports, 838.
- on disputes between the United States and States, 1109.
- on meaning of crime, 1139.
- on power of courts to annul laws, 1187.
- on rights of citizens in other States, 1218, 1219.
- on right of asylum in a State, 1239.
- on the omission of a bill of rights in the Constitution, 1351 n.
- on taking private property, 1461.

References are to pages.

- HARLAN, JUSTICE** (continued)—
on cruel punishment, 1516, 1518.
on suits against States, 1545.
on line between State and Federal taxation, 1639.
- HARLAN, JAMES**—
Senate election contest of, 240.
- HARNETT, CORNELIUS**—
signed Articles of Confederation, 1698.
- HARPER'S FERRY**—
trial of John Brown for treason at, 1779.
- HARRIS, IRA**—
member of Reconstruction Committee, 1597.
- HARRISON, BENJAMIN**—
member of first Colonial Congress, 2.
reported Declaration of Independence to Congress, 19.
signed the Declaration of Independence, 26.
member of committee of correspondence with foreign nations, 949 n.
- HARRISON, BENJAMIN**—
vetoes by as President, 376.
- HARRISON, RICHARD H.**—
appointed member of first Supreme Court, 1055 n.
- HARRISON, WILLIAM HENRY**—
no vetoes by, as President, 376.
- HARVIE, JOHN**—
signed Articles of Confederation, 1698.
- HASTINGS, WARREN**—
impeachment of, 1030 n.
- HATSELL**—
Parliamentary Precedents, 306, 307.
- HAWAII**—
delegate from, to Congress, 154.
courts of, authorized to decide on constitutionality of laws, 1169.
when Fifth Amendment not applicable to trial in, 1434, 1435.
- HAXEY**—
sentence of treason annulled by King, 323.

References are to pages.

HAY, GEORGE—

letter of Madison to, concerning electors, 1558.
letter of Jefferson to, on the electoral college, 1579.

HAYES, RUTHERFORD B.—

vetoed by as President, 376.
on powers of President, 929 n.
contest with Tilden for Presidency, 1570, 1571.

HEADS OF DEPARTMENTS (see CABINET)—

may appoint inferior officers, 972.
relation of, to the President, 923, 924.
President may remove, 988.

HEALTH LAWS—

States may sue when public health involved, 1127.

HEATING OF RAILWAY CARS—

regulation of, 544, 553.

HEMPHILL, JOHN—

expelled from Senate, 289.

HENDERSON, DAVID B.—

Speaker of the House of Representatives, 206.

HENDERSON, JOHN B.—

moved that Chief Justice Chase pass on evidence in impeachment trial of President Johnson, 217.
introduced resolution to abolish slavery, 1583.
author of the Fifteenth Amendment, 1667.

HENRY, PATRICK—

member first Colonial Congress, 2.
opposed equality of States, 5.
member of committee to prepare address to the King, 9 n.
in Virginia Convention opposed the Constitution, 54, 105 n.
refused to serve as member of the Constitutional Convention, 64, 868 n.
opposed authority of Congress over elections, 271.
opposed Congress fixing compensation of its members, 305 n.
secured passage of bill of attainder against Josiah Philips, 735, 737 n.
on omission of a bill of rights in the Constitution, 1352 n.
on suits against States, 1536.

HENRY, PRINCE OF PRUSSIA—

gifts by, to American officials, 760.

HENRY IV, 323.

References are to pages.

HENRY VI, 306, 323.

HENRY VIII, 324, 342.

HEROD, KING, 682.

HEWES, JOSEPH—

member of committee to prepare Articles of Confederation, 23.

HEYWARD, THOMAS—

member of second Colonial Congress, 26 n.

signed Articles of Confederation, 1698.

HICKEY, WILLIAM—

on the Constitution, 1571 n.

HIGH SEAS—

felonies on punishable by Congress, 670.

include Great Lakes, 676.

trial of offences committed on, 1144.

HIGH SHERIFFS OF ENGLAND, 905 n.

HINDMAN, WILLIAM—

member of second Colonial Congress, 1045 n.

HOLDEN, JUDGE—

impeachment of, 1037.

HOLDING COMPANIES—

Justice Harlan on, 548.

HOLLAND—

government of, 1286.

HOLMES, JUSTICE—

on due process of law, 1448.

on insurance combinations, 1630.

HOLTEN, SAMUEL—

signed Articles of Confederation, 1698.

HOMES—

cannot be invaded for search and seizure, 1414, 1430.

HOOPER, WILLIAM—

member of second Colonial Congress, 26 n.

HOPKINS, STEPHEN—

member first Colonial Congress, 1.

member of committee on Articles of Confederation, 23, 1047 n.

References are to pages.

HOPKINSON, FRANCIS—

member of the Second Colonial Congress, 26.

HORSE RACING—

regulation of, by the States, 601.

HOSMER, TITUS—

member of the Court of Captures, 1044.

signed the Articles of Confederation, 1697.

HOURS OF LABOR—

regulation of, for working women, 1629.

HOUSE OF DELEGATES—

name suggested for the lower branch of Congress, 53, 125, 130.

HOUSTON, WILLIAM C.—

delegate to Constitutional Convention, 59, 60.

failed to sign the Constitution, 65.

in debates in Constitutional Convention, 864, 878, 1284.

member of commission on Pennsylvania-Connecticut dispute, 1049.

HOUSTOUN, WILLIAM—

delegate to Constitutional Convention, 59.

failed to sign the Constitution, 65, 457 n.

HOVEY, MAJOR GENERAL—

ordered arrest of Lambda P. Milligan for sedition, 727.

HOWARD, JACOB M.—

part taken in impeachment trial of President Johnson by, 1005.

part taken in enactment of the Fourteenth Amendment by, 1597,
1604, 1613.

on the word "abridged" in the Fourteenth Amendment, 1653 n.

HOWE, TIMOTHY O.—

favored President signing amendments to the Constitution, 1319.

HOWELL—

State trials, 219, 222.

HOWISON, ROBERT R.—

on effort to establish the Episcopal Church in Virginia, 1376, 1377.

HUBBELL, JUDGE—

impeachment of, 216.

HUME—

History of England, by, 323, 331.

References are to pages.

HUMPHREYS, JUDGE—

impeachment of, 211, 1037.

HUMPHREYS, CHARLES—

member of first Colonial Congress, 2, 18.

HUNT, JUSTICE—

on the right of suffrage, 139, 140.

defined tax, 389.

HUNTER, ROBERT M. T.—

Speaker of the House of Representatives, 205.

expelled from the Senate, 289.

HUNTINGTON, JUDGE—

impeachment of, 1170.

HUNTINGTON, SAMUEL—

President of the second Colonial Congress, 206.

member of the Committee of Captures, 1043.

signed Articles of Confederation, 1697.

HUTSON, RICHARD—

signed the Articles of Confederation, 1698.

HYLTON v. UNITED STATES—

decision in on direct tax, 179-183, 188, 193-196.

argument of Hamilton for the government in, 193-196.

I.

ILLINOIS—

Marshall-Trumbull election contest in, 157.

candidacy of members of legislature for United States Senate forbidden in, 250.

Lincoln resigned seat in Legislature in, to become candidate for United States Senate, 250.

laws on stopping of trains in, 556, 558.

unlawful drilling in, 1409.

ILLITERATES—

may be naturalized, 619.

IMMUNITIES AND PRIVILEGES OF CITIZENS—

discussed, 1213-1215.

IMMUNITY OF PRESIDENT FROM COURT SUMMONS—

discussed, 1012-1027.

References are to pages.

IMPAIRMENT OF OBLIGATION OF CONTRACTS BY STATES—

prohibited, 774, 804.
 definition of impairment, 797.
 not prohibited to Congress, 829 n, 834.
 Miller, Justice, on, 830.
 Strong, Justice, on, 831.
 Gerry, on, 831.
 Von Holtz on, 834.

IMPARTIAL JURY GUARANTEED—

considered, 1477-1479.

IMPEACHMENT—

House of Representatives has sole power of, 207.
 no provisions for, under Articles of Confederation, 207.
 Sumner on purpose of impeachment, 208.
 in Parliament, 209 n.
 managers of impeachment trial, how selected, 211.
 impeached called to bar of Senate, 211
 form of subpoena for witness in impeachment trial, 212.
 form of summons for impeached, 213.
 form of summons for witnesses in, 214.
 burden of proof in impeachment trial, 214.
 articles of, not amendable, 215.
 no impeachment after expiration of term of office, 215.
 no challenge of Senators allowed in impeachment trial, 217.
 Senators cannot be excused from impeachment trials, 220.
 vote of Chief Justice in impeachment trial, 221.
 Hamilton's views of, 257-261.
 Supreme Court proposed as tribunal for, 257.
 Chief Justice presides at impeachment trial of President, 256,
 260-262.
 two-thirds of a quorum of the Senate necessary to convict, 263,
 264.
 removal and disqualification on conviction in trial of, 266..
 court trial may follow conviction in case of, 268.
 President cannot pardon after conviction in case of, 945.
 what officers are impeachable, 1027-1031.
 military and naval officers exempt from, 1031.
 of judges, 1081.

IMPORTS (see DUTIES)—

duties on, 386-389.
 in original packages, 512.
 duties on not to be levied by States, 834, 841.
 definition of, 837-839.
 human beings and corpses not imports or exports, 839.

References are to pages.

IMPOSTS—

- power of Congress to lay and collect, 382, 384.
- definition of, 386, 387.
- not to be levied by States without consent of Congress, 834, 843.

IMPRISONMENT FOR DEBT—

- in Rhode Island, 825.

INABILITY OF PRESIDENT—

- what is, and how determined, 893-896.

INCOME TAXES—

- Swayne, Justice, on, 187, 188.

INDEPENDENCE (see DECLARATION OF INDEPENDENCE).

INDIANS—

- provision for in Franklin's plan, 22.
- under Articles of Confederation, 28-29.
- commerce with, 516-519.
- barred from citizenship, 618.

INDICTMENT—

- what it must state, 1482.
- accused entitled to copy of, 1483.
- when accused cannot waive, 1335, 1336.

INELIGIBILITY OF CONGRESSMEN TO OTHER OFFICES—

- considered, 330-341.

INFERIOR COURTS—

- establishment of, 1050, 1063.
- abolishment of, 1074.

INFERIOR OFFICERS—

- who are, 973.
- heads of departments may appoint, 972.

INGERSOLL, JARED—

- delegate to Constitutional Convention, 62.
- counsel in *Hylton v. United States*, 183 n.
- signed the Constitution, 1347, 1770.

INHABITANT OF STATE—

- representative in Congress must be, 165.

INQUISITION—

- Spanish, 1486.

References are to pages.

INSANITY—

- of juror, 1439.
- of defendant, 1474.

INSPECTION LAWS—

- objects of, 565.
- not regulations of commerce, 565, 566.
- Marshall on, 567.
- power to enact vested in States, 565, 840.
- history of, 840.

INSTRUCTIONS—

- to Senators, 234, 235.
- views of Washington and Madison on, 236 n.

INSTRUCTION OF DELEGATES—

- to Constitutional Convention, 46-48.

INSURANCE COMPANIES—

- direct tax on, 183.
- charters of, 820.
- rights of, in other States, 1215.
- combinations of, 1630.
- not amenable to Interstate Commerce Commission, 519-521.

INSURRECTION—

- suppression of, 690, 691.
- defined by Grosscup, Judge, 1656.

INTERIOR DEPARTMENT—

- when established, 662.
- took over Patent Department, 662.

INTERNAL IMPROVEMENTS—

- power of Congress to make, 643-653.
- Jefferson on, 643.
- Madison on, 644.
- Monroe on, 645.
- Adams, John Q., on, 645.
- Jackson on, 646.
- Polk on, 647.
- power of Congress to establish post roads, 649-653.

INTERSTATE COMMERCE COMMISSION—

- when established, 536.
- duties of, 537.
- powers of, 538 n.
- testimony before, 1428.
- rights of witnesses before, 1444.

References are to pages.

INTOXICATING LIQUORS—

- what is a delivery of, 488.
- what is an original package of, 515.
- Congress can regulate introduction of, among the Indians, 518, 519.
- when shipment and holding of, is interstate commerce, 549, 550.
- States can regulate dealing in, within their borders, 550, 601, 603.

IN TRANSIT—

- when goods are in, 540, 542.

INVASION—

- definition of, 691.
- power to repel, 690, 691.

INVESTIGATIONS BY CONGRESS—

- attendance of witnesses at, 286, 287.

IOWA—

- no Bill of Rights in Constitution of, 1443.

IRELAND—

- included in Franklin's plan of union, 22, 1687.

IREDELL, JUSTICE—

- on direct taxes, 182.
- opinion of in *Chisholm v. Georgia*, 1104 n, 1537.
- on cases and controversies, 1106.
- on the amendments, 1308 n.

IZARD, RALPH—

- member of the first Senate, 225.
- member committee on copyright, 660.
- member of committee on title for President, 851-853 n.
- reproved by Vice-President Adams, 851-853 n.
- avored Senate passing on removals from office, 978 n.
- on the establishment of the Supreme Court, 1055.
- opposed the early amendments, 1367.

J.

JACKSON, ANDREW—

- vetoed by, as President, 376.
- differed with Senate about his constitutional authority, 376, 377 n.
- refused as General to obey writs of habeas corpus, 733.
- criticised by Justice Story, 814 n.
- creates Cabinet officer, 933.
- absences from the capital while President, 1011 n.
- on South Carolina nullification, 1178 n.

References are to pages.

JACKSON, JUSTICE—

- on interstate commerce, 502.
- on the power of the Supreme Court to reverse the decisions of State Courts, 803.

JACKSON, WILLIAM—

- secretary of Constitutional Convention, 58.
- burned the records of Constitutional Convention, 53 n.
- signed the Constitution as secretary, 1350, 1770, 1772.

JAMES I—

- testified in court, 1022 n.
- granted charter to Virginia, 1206.

JAMES II—

- abdicated the throne, 1505.

JAMESON, JOHN F.—

- on Pinckney's draft of the Constitution, 73 n.
- on treason against a State, 1228.
- on early State constitutions, 1302.

JAPANESE—

- barred from citizenship, 618.

JAY, CHIEF JUSTICE—

- member of the first Colonial Congress, 1.
- opposed opening Congress with prayer, 5 n.
- prepared address to people of Great Britain, 8 n.
- on a proposed Constitutional Convention, 49, 50.
- his writings in the Federalist, 78 n.
- ruling of, on Preamble, in *Chisholm v. Georgia*, 99, 101.
- on the objects of the Constitution, 99.
- President of the second Colonial Congress, 206.
- member of committee on secret correspondence with foreign nations, 949 n.
- appointed Chief Justice of the Supreme Court, 1055 n.
- on extent of judicial power over cases, 1094.
- on extent of judicial power over controversies, 1108, 1109.
- on suits against States by citizens of other States, 1114, 1116.
- on suing a State, 1541.

JAY'S TREATY—

- with England, 958-964.
- House demanded papers of President Washington concerning, 234 n, 958.
- Washington's reply to House, 958.
- Washington declined to surrender papers to House, 959-961.
- Jefferson's views on, 964.

References are to pages.

JEALOUSY OF SMALL STATES—

- in first Colonial Congress, 5, 6.
- in establishing the Senate, 226 n, 233 n.

JEFFERSON, THOMAS—

- on the address to people of Great Britain, 7 n, 8 n.
- member of second Colonial Congress, 13.
- member of Committee on Independence, 13 n.
- author of Declaration of Independence, 13-16 n.
- account of the Declaration, 16-18 n.
- signed Declaration of Independence, 22.
- Washington's letter to, on inefficiency of Congress, 32.
- on the term "Constitution," 107.
- opposed two branches of Congress, 124 n.
- on qualifications of Representatives, 158, 160.
- on John Adams' opinion of the Senate, 231 n.
- favored a jury trial in impeachment cases, 286 n.
- on increase of congressional compensation, 302 n-303 n.
- on the veto power, 361 n.
- account of Washington's first veto, 372.
- vetoed no bills while President, 373; 376.
- on the taxing power of Congress, 390.
- on power of Congress over wharves, 501 n.
- founder of Patent Office, 661, 662 n.
- as an inventor, 661 n, 662 n.
- on habeas corpus, 731 n.
- asked House of Representatives to suspend writ of, 732 n.
- accepted bust from Czar Alexander while President, 761.
- favored a single President, 859-861 n.
- favored short term for President, 870 n.
- on taking the oath as President, 909, 910.
- relations with his cabinet, 931, 932 n.
- on the treaty power, 956, 957.
- on removals from office, 982.
- first President to send written message to Congress, 1000, 1001.
- absences from capital while President, 1010.
- refused to attend Burr trial as witness, 1012-1017.
- favored seriatim opinions by justices of Supreme Court. 1061, 1063 n.
- invited British troops to become American citizens, 1207 n.
- planned to establish new States in the Northwest, 1246 n.
- purchased Louisiana Territory from Napoleon, 1265-1269.
- questioned his constitutional power to purchase Louisiana, 1266.
- on omission of a bill of rights from the Constitution, 1360.
- author of a bill for religious freedom in Virginia, 1377-1381.

References are to pages.

- JEFFERSON, THOMAS** (continued)—
 views of, on church and state, 1381.
 favored direct vote for President, 1579 n.
- JEFFREYS**—
 judge of Star Chamber in England, 1076 n.
- JENIFER, DANIEL, OF ST. THOMAS**—
 delegate to Constitutional Convention, 60.
 proposed triennial elections to Congress, 126.
 signed the Constitution, 1347, 1771.
- JEOPARDY**—
 under the Fifth Amendment, 1436-1442.
 no person to be twice placed in, for same offense, 1436.
 defined, 1437.
 what is not being twice in, 1438, 1440, 1442.
 effect of nolle prosequi on, 1441.
 trial in United States after acquittal in Philippine Islands is twice in, 1441.
- "JIM CROW CARS"**—
 in Louisiana, 563, 1591, 1592.
 in Kentucky, 564.
- JOHN, KING**—
 granted Magna Charta, 1138, 1142, 1354.
- JOHNSON**—
 on the electoral college, 1563 n.
- JOHNSON, ANDREW**—
 impeachment of, 208-221.
 vetoes by, as President, 376.
 thought President should approve amendments to the Constitution, 1319-1321.
 vetoed Civil Rights Bill, 1607.
- JOHNSON, DR. SAMUEL**—
 defined bankruptcy, 629, 630.
- JOHNSON, THOMAS, JR.**—
 member of committee of first Congress to prepare address to the King, 9 n.
- JOHNSON, REVERDY**—
 questioned Sumner's right to sit in impeachment trial of President Johnson, 220.
 on republican form of government, 1291.
 opposed submitting constitutional amendments to President for approval, 1319.
 member of Reconstruction Committee, 1597.

References are to pages.

JOHNSON, JUSTICE—

- on the cause of the Constitutional Convention, 454, 455.
- on the regulation of navigation, 498-502.
- on ex post facto laws, 777 n.
- on bankruptcy, 783, 784 n.
- Jefferson's letter to, concerning seriatim opinions, 1061-1063 n.
- Jefferson's letter to, on the Tenth Amendment, 1530.

JOHNSON, WILLIAM S.—

- delegate to the Constitutional Convention, 58.
- member of Committee on Style in Convention, 90.
- member of the first Senate, 225.
- member of Committee on Commerce, 457.
- member of Committee on title for President, 852 n.
- member of committee to correspond with foreign powers, 949 n.
- avored Senate passing on removals, 978.
- member of Committee on Judiciary, 1040 n.
- member of Committee on Court of Appeals, 1045 n.
- author of clause concerning judicial power, 1093.
- member of Committee on Full Faith and Credit Clause, 1195 n.
- signed the Constitution, 1346, 1770.

JOINT COMMITTEE OF CONGRESS ON TITLE OF PRESIDENT—

- members of committee, 851 n.

JOINT RAILWAY RATES—

- power of Interstate Commerce Commission concerning, 538 n.

JOINT AND CONCURRENT RESOLUTIONS—

- discussed, 377, 380.

JOINT TRAFFIC TRUST CASE—

- United States v. Joint Traffic Association, 586.

JONES, JOHN W.—

- Speaker of the House of Representatives, 205.

JONES, WALTER—

- delegate to the Annapolis Conference, 39.

JONES, WILLIAM—

- refused to serve in Constitutional Convention, 64.

JOURNALS OF CONGRESS—

- under the Articles of Confederation, 30.
- of the House and Senate, 293-298.
- respected as law by the courts, 296-298.
- secret, 295.

JUDGES, FEDERAL—

- Constitution provides no qualifications for, 1167 n.

References are to pages.

JUDICIAL POWER—

- where vested under Constitution, 1050.
- taken from State Constitutions, 1053.
- not defined by the Constitution, 1084.
- what is, 1084, 1086, 1087.
- to what it extends, discussed, 1084-1124.
- suggested in Convention by William S. Johnson, 1093.

JUDICIAL PROCEEDINGS IN A STATE—

- recognized in other States, 1197-1204.

JUDICIARY—

- recognized in Preamble, 100, 101.

JUDICIARY ACT OF 1789,

- Ellsworth author of the, 1054 n, 1055 n.

JULY 2, 1776—

- date when Declaration of Independence was agreed upon, 20 n.

JULY 4, 1776—

- Declaration of Independence adopted, but not signed on, 18 n, 19, 20.

JUNTO—

- second Colonial Congress described as a, 31-34.

JURISDICTION OF SUPREME COURT—

- original, 1122.
- appellate, 1127.

JURY OF EIGHT IN UTAH—

- constitutional, 742.

JURY TRIAL—

- proposed for impeachment trials, 266 n.
- limited to criminal cases by original jurisdiction, 1134.
- not allowed in case of contempt or injunction, 1138.
- origin of, 1140-1142, 1407.
- defined by Gray, Justice, 1142.
- twelve men in, necessary unless the State Constitution provides otherwise, 1142, 1143, 1470.
- unanimous verdict in, 1143.
- challenge of jury, 1143, 1477, 1479, 1498, 1499.
- insane jurors, 1439.
- impartial trial, 1477.
- right of, in suits involving more than \$20.00, secured, 1490.
- Chase, Chief Justice, on, 1477.
- Miller, Justice, on, 1491.
- in territories, 1494.

References are to pages.

JURY TRIAL (continued)—

- at common law, 1494.
- not a proceeding in equity, 1496.

JUST COMPENSATION—

- what is, 1469, 1470.
- private property cannot be taken without, 1458, 1470.

JUSTICE—

- establishment of, one of the objects of the Constitution, 100.

K.

KANSAS—

- anti-trust law of, constitutional, 591.

KEIFER, J. WARREN—

- Speaker of the House of Representatives, 205.
- on representation under the Fourteenth Amendment, 1651.

KELLEY, W. D.—

- part in the Fourteenth Amendment, 1668.

KENT, CHANCELLOR—

- on direct taxes, 188.
- on command of militia, 693.
- on decision in Charles River Bridge case, 812 n.
- on election of President, 886 n.
- on council of revision of laws, 1171 n.
- on annulment of laws, 1182 n.

KENTUCKY—

- Senator Lindsay requested by legislature of, to resign from Senate, 235.
- resignation of Senator Bledsoe of, from Senate, 245.
- separate cars for colored passengers in, 564.
- vacancies in appointments in, 997.
- "good behavior" defined by courts of, 1073.
- alien and sedition laws of, 1177, 1178.
- resolution of legislature of, against titles, 1678.

KENYON, LORD—

- restored practice of seriatim opinions by English judges, 1062.

KERR, MICHAEL—

- Speaker of the House of Representatives, 205.

KIES, MARY—

- first woman to obtain a patent, 662 n.

References are to pages.

KING, RUFUS—

introduced resolution in second Colonial Congress for holding Constitutional Convention, 45-49.
 on plans for the Convention, 49, 50, 51.
 delegate to Constitutional Convention, 60.
 member of Committee on Style, 90.
 on property qualifications for representatives, 145.
 on apportionment in House of Representatives, 166.
 member of first Senate, 225.
 opposed annual meetings of Congress, 276.
 proposed twenty-year term for President, 869, 870.
 on qualifications of electors, 883.
 opposed two-thirds as necessary to ratify treaty, 950.
 opposed impeachment of President, 1029.
 member of Committee on Appeals, 1025 n.
 member of Grand Committee on State Debts, 1323 n.
 on ratification of the Constitution, 1341.
 author of quorum clause in the Constitution, 1559.
 signed Constitution, 1346, 1770.

KING, SAMUEL W.—

action of in Dorr rebellion, 1229, 1295.

KING GEORGE III—

address of first Colonial Congress to, 6-9.
 address ascribed to Dickinson, 9 n.
 John Adams on, 9 n.
 naturalization under the King, 612.

KING AND PRESIDENT—

compared by Hamilton, 863.
 concerning their testimony in court, 1019, 1021, 1022.
 suits against the King, 1540.

KINSEY, JAMES—

member of first Colonial Congress, 2.

KNOX, PHILANDER C.—

appointed Secretary of State while Senator, 336.
 remarks of, on Interstate Commerce Commission, 538 n.
 opinion of, as Attorney General, on recess of Congress, 991.

KNOX, HENRY—

writes Washington on plans for a Constitution, 51.
 Secretary of War in Washington's cabinet, 909, 965.

L.

LABOR—

no federal control over in the States, 532 n.
combinations and anti-trust laws concerning, 594.
laws concerning, in States, 606-610.
hours of, for women, 1629.

LAFAYETTE, MARQUIS DE—

Washington's letter to, 87, 456.

LAMAR, JUSTICE—

on the commerce power of the Constitution, 484, 494.
on federal regulation of State commerce, 524.
on removals from office, 983.
on the Fourteenth Amendment, 1662.

LAND CESSIONS—

by States, to the United States, 1256-1258.

LANGDON, JOHN—

delegate to Constitutional Convention, 59.
member of first Senate, 225.
first President pro tempore of Senate, 255 n-256 n.
on bills of credit, 412.
opposed taxing exports, 749.
on regulation of tonnage, 837.
favored Senate passing on removals from office, 978.
member of Grand Committee on State Debts, 1323 n.
signed Constitution, 1346, 1770.
opposed original amendments, 1367.

LANGWORTHY, EDWARD—

signed Articles of Confederation, 1698.

LANSING, ABRAHAM—

favored amending the Articles of Confederation, 54.
elected member of the Constitutional Convention, 61.
withdrew from Convention, 64, 65.

LAURENS, HENRY—

member first Colonial Congress, 26 n.
President first Colonial Congress, 206.
signed Articles of Confederation, 1698.

LAW AND EQUITY—

distinction between, 1090, 1091.
in England, 1089.
Marshall on, 1090, 1091.

References are to pages.

LAW OF THE LAND—

same as "due process of law," 1450.

LAW OF NATIONS—

offenses against, punishable by Congress, 675.

LAWS—

equal protection of, considered, 1630, 1649.

unconstitutionality of, considered, 1168, 1191.

LAW SUITS—

involving over \$20, jury trial in, allowed, 1490.

LEAVITT, JUDGE—

opinion of, in Vallandigham case, 726.

LEA—

on "The Inquisition," 1486.

LEE, HENRY—

Madison's letter to, 635.

LEE, RICHARD HENRY—

prepared an address to people of Great Britain in first Colonial Congress, 9 n.

the address rewritten by Jay, 8 n.

introduced Virginia's demand for independence in second Colonial Congress, 13.

rival of Jefferson, 14.

credited Locke with suggesting Declaration of Independence, 17 n.

President of second Colonial Congress, 206.

member of first Senate, 225.

member of Committee to suggest title for President, 851.

avored Senate passing on removals, 978 n.

on constitutional amendments, 1369 n.

called Senate to order at meeting of first electoral college, 1571.

signed Articles of Confederation, 1698.

LEE, ROBERT E.—

on treason to State and nation, 1227.

LEE, FRANCIS LIGHTFOOT—

signed Articles of Confederation, 1698.

LEGAL TENDER—

debate on, in Constitutional Convention, 410-414.

credit clause, effect of, 414.

Madison, Morris, Mason, Mercer, Randolph, Ellsworth, Langdon,

Butler and Reed on, 410-413.

References are to pages.

LEGAL TENDER (continued)—

- opinion of Chase, Chief Justice, on, 415, 418-428.
- Miller, Justice, dissent of, in *Hepburn v. Griswold*, 428-430.
- Strong, Justice, on, 437-442.
- Bradley, Justice, on, 442-444.
- Gray, Justice, on, 451.

LEGARE, HUGH S., ATTORNEY GENERAL—

- on compacts between States, 847.

LEGISLATIVE POWERS—

- granted to Congress, 110-124.
- definition of, 114.
- cannot be delegated, 117.
- clauses on, in plans of Randolph, Pinckney, Paterson and Hamilton for a Constitution, 112, 113, 703.

LEGISLATURES—

- election of Senators by, 237-241.
- danger from tyranny of, 1362.

LETTERS OF MARQUE AND REPRISAL—

- Congress has power to grant, 681-683.

LETTERS AND SEALED PACKAGES IN MAIL—

- protection of, 1425, 1426.

LETTER OF CONGRESS—

- to States recommending the Articles of Confederation, 23-25.

LETTER OF WASHINGTON AS PRESIDENT OF CONSTITUTIONAL CONVENTION—

- transmitting the Constitution to Congress, 1172.

LEVEES—

- built by United States, 1467.

LEVYING WAR AGAINST THE UNITED STATES—

- is treason, 1148, 1149.

LEWIS, FRANCIS—

- signed the Articles of Confederation, 1697.

LEXINGTON—

- battle of, 22, 23.

LIBERTY—

- establishment of, one of the purposes of the Constitution, 104.
- definition of, 1625-1627.

LICENSE CASES—

- sustain federal law when in conflict with State law, 489.

References are to pages.

LIFE, LIBERTY AND PROPERTY—

guaranteed, 1448-1471.
deprivation of life without due process of law, 1453, 1454.
deprivation of liberty without due process of law, 1454, 1455.
deprivation of property without due process of law, 1456, 1457.
liberty is not license, 1455.

LIFE TENURE FOR PRESIDENT—

suggested by Gouverneur Morris, 864.

LIGHTHOUSES—

tonnage fees for, 836.

LINCOLN, ABRAHAM—

candidate for United States Senate, 250.
vetoes by, as President, 376.
Emancipation proclamation of, issued under the war power, 913 n.
established provisional court in Louisiana, as President, 917 n.
suggested reduction of punishment for treason, 1154.
opposed confiscation act as President, 1158.

LINCOLN, LEVI, ATTORNEY GENERAL—

opinion of concerning purchase of Louisiana, 1266, 1267.

LINDSAY, SENATOR—

requested to resign by State Legislature, 235.

LIQUORS, INTOXICATING—

what constitutes delivery of, 488.
Congress can regulate introduction of among Indians, 518, 519.
when shipment and holding of is interstate commerce, 549, 550.
State may regulate dealing in, within its borders, 550, 601, 603.
Congress can prohibit sale of, in the territories, 1263.

LIQUOR SHIPMENTS—

in original packages, 488, 511, 516.
to Indians, 518.

LIVELIHOOD—

right to earn, included in definition of liberty, 1626.

LIVE STOCK TRUST CASES, 588, 590, 591.

LIVINGSTON, PHILIP—

member of the first Colonial Congress, 1.

LIVINGSTON, EDWARD—

letter from Madison to, 203.

References are to pages.

- LIVINGSTON, ROBERT—**
 member of Committee on Declaration of Independence, 13 n, 16.
 opposed the Declaration of Independence, 20.
 member of Committee on Articles of Confederation, 23, 1047 n.
- LIVINGSTON, WILLIAM—**
 delegate to Constitutional Convention, 59.
 as Governor of New Jersey, asked by Noah Webster to grant copy-
 right, 659.
 letter from Jefferson to, 709 n.
 member of Grand Committee on State Debts, 1323 n.
 signed Constitution, 1346, 1770.
- LIVY, 1458.**
- **LOCAL OFFICES OF FOREIGN CORPORATIONS—**
 may be required in each State, 545.
- LOCKE, JOHN—**
 concerning the Declaration of Independence, 17 n.
 definition of legislative power by, 114.
 on taxes, 195.
- LODGE, HENRY CABOT—**
 on Marshall's ruling on treason, 1013 n.
- LOGAN, JOHN A.—**
 on the Fifteenth Amendment, 1671.
- LONG AND SHORT HAUL—**
 statutes on, constitutional, 551, 552.
- LONG TERM FOR PRESIDENT—**
 discussed in Constitutional Convention, 868, 869.
- LONGMAN, WILLIAM—**
 on trial by ordeal, 1137.
 on jury trials, 1142.
- LOT—**
 first senatorial classes determined by, 242, 243.
- LOTTERIES—**
 considered, 826, 827.
- LOTTERY CASE—**
 in relation to commerce, 476, 485, 528.
- LOUISIANA TERRITORY—**
 acquisition of, 1252.
 Josiah Quincy, on purchase of, 1281 n.

References are to pages.

LOUISIANA TERRITORY (continued)—

- purchased by Jefferson from Napoleon, 1265-1269.
- plan for States in, 1268.
- letter of Jefferson to Thomas Paine concerning, 1269.
- Chase, Chief Justice, on organization of, 1268 n.
- Adams, J. Q., on effect of purchase of, 1268 n.
- Brown, Justice, on the purchase of, 1270.

LOUISIANA—

- bills of credit in, 772.
- provisional courts established in, 917 n.
- good behavior defined by courts of, 1072.

LOVELL, JAMES—

- signed Articles of Confederation, 1697.

LOW, ISAAC—

- member of first Colonial Congress, 1.

LYNCH, THOMAS—

- member of first Colonial Congress, 206.

LYONS, LORD—

- Seward's letter to, on President as commander in chief, 917.

M.

McCLURG, JAMES—

- delegate to Constitutional Convention, 63, 64.
- failed to sign Constitution, 65, 1347.
- succeeded Patrick Henry in Constitutional Convention, 868 n.

McCULLOCH—

- on bankruptcy, 629.

McHENRY, JAMES—

- delegate to Constitutional Convention, 60.
- member of first Senate, 225.
- on duties and imposts, 383.
- letter to Washington on the trade of the States, 455.
- on tonnage, 836.
- member of Grand Committee on State Debts, 1323 n.
- signed Constitution, 1347, 1771.

McKEAN, THOMAS—

- member of first Colonial Congress, 2.
- letter on Declaration of Independence, 18, 19 n.
- member of Committee on Articles of Confederation, 23, 1047 n.
- President of second Colonial Congress, 206.

References are to pages.

McKENNA, JUSTICE—

- on monopoly, 593.
- on speedy trials, 1476.
- on negro suffrage, 1648.

McKINLEY, WILLIAM—

- vetoed by, as President, 376.
- removed an appraiser, 985.
- acquisition of national territory under, 1252.

McLEAN, JUSTICE—

- on railroads and commerce, 502.
- on treaties, 964.
- on federal courts, 1118.

McMASTER, JAMES B.—

- on amendment against titles in Kentucky Legislature, 1678.

MACAULAY, LORD—

- on Lord Ashley's speech on treason, 1487, 1488.

MACLAY, WILLIAM—

- member of first Senate, 225.
- avored Senate passing on removals from office, 978 n.
- criticism of Vice-President Adams by, 852, 853 n.

MACON, NATHANIEL—

- Speaker of the House of Representatives, 205.

MADISON, JAMES—

- delegate to Annapolis Convention, 39.
- on Virginia sentiment for trade laws, 40 n, 45.
- objections to adopting a Constitution answered by, 54, 57.
- delegate to Constitutional Convention, 63.
- on the Pinckney draft of the Constitution, 67 n, 75.
- attributed the Constitution to Annapolis Conference, 80.
- ascribed first public proposal of a Constitution to Pelatiah Webster, 81-83 n.
- letter to, from Noah Webster, 84.
- claimed to have first suggested in writing the formation of the Constitution, 87.
- member of Committee on Style, 90.
- on characteristics of the Constitution, 98.
- on common defense, 103.
- proposed amendment to Preamble, 106 n.
- on the powers of the government, 111, 112.
- avored two branches of Congress, 123, 124.
- opposed annual elections to Congress, 128.

*References are to pages.***MADISON, JAMES** (continued)—

- favored popular vote for representatives, 131.
- on limiting suffrage to freeholders, 135.
- on qualifications of voters, 145, 146.
- claimed tax on carriages was unconstitutional, 179.
- on compensation of chaplain in House of Representatives, 203 n.
- favored a small Senate, 228.
- favored seven-year term for Senators, 230.
- called Senate a compromise between large and small States, 233 n.
- on instructions to Representatives, 236 n.
- on impeachment, 267.
- on absence of members from Congress, 280.
- favored a two-thirds vote for expulsion from Congress. 290.
- on compensation of Representatives, 302-305.
- on freedom of debate, 330.
- opposed office-holding by Representatives, 332.
- favored money bills originating in either House of Congress, 343, 344.
- on veto power, 358, 361 n, 377.
- on return of bills to House, 364, 365 n.
- vetoes by, as President, 376.
- opinion on vetoes, 377 n.
- on regulation of trade, 455, 456.
- on commerce with Indians, 462.
- on the tariff, 485 n.
- favored Congress granting charters to corporations, 571.
- favored establishment of a national college, 611.
- on naturalization, 613.
- on bankruptcy laws, 631.
- on coinage, 638.
- letter of on the establishment of the mint, 636, 637.
- on post roads, 642, 643.
- on copyrights, 659, 660.
- favored establishment of inferior courts, 668, 670.
- on expressed powers of Congress, 704-706.
- on habeas corpus, 729, 1360.
- on attainder and ex post facto laws, 734, 735.
- on export taxes, 750, 751.
- member of committee on title for President, 851 n.
- on difficulty of establishing the Executive department, 853 n.
- opposed election of President by Congress. 877.
- on vacancy in Presidential office, 901.
- on the President's relation to his cabinet, 934 n.
- on the power of the President to remove from office, 976, 978, 981, 987.

References are to pages.

MADISON, JAMES (continued)—

- on recess appointments, 995 n.
- absences from capital while President, 1010 n.
- views on impeachment, 1028-1036.
- avored seriatim opinions by judges of Supreme Court, 1063 n.
- on compensation of judges, 1078, 1079.
- on full faith and credit, 1193-1195.
- on the power of Congress over the territories, 1256-1259.
- on guarantee of republican form of government, 1283, 1286.
- on domestic violence, 1293-1295.
- author of clause proposing amendments to Constitution, 1303-1306, 1321 n.
- on equal vote of States in the Senate, 1307.
- letter to Hamilton on ratification of amendments, 1317.
- on supreme law of the land, 1326, 1327.
- on ratification of the Constitution, 1342-1344.
- signed the Constitution, 1347 n.
- on omission of a Bill of Rights from the Constitution, 1357, 1676.
- moved the appointment of a committee in House of Representatives to prepare amendments, 1363.
- member of committee to prepare amendments, 1365.
- proposed incorporating amendments in the Constitution, 1365-1367.
- author of first ten amendments, 1371, 1372.
- speech in Congress in behalf of the amendments, 1373.
- author of the Bill of Rights, 1530, 1531.
- speech in Virginia Convention on suits against States, 1537.
- avored the election of electors by districts, 1558 n.

MAGNA CHARTA—

- grant of right of trial by jury under, 1138.
- jury system under, 1141.
- deprivation of property under, 1459.
- bail under, 1506.
- excessive fines under, 1510.

MAILS—

- exclusion of objectionable matter from, 1403.
- letters and sealed packages in, cannot be searched, 1425.

MAINE, SIR HENRY—

- on ordeals in India, 1137.
- on the electoral college, 1563.

MANDAMUS—

- first suit in, in Supreme Court, 116, 117.

References are to pages.

MANSFIELD, LORD—

introduced caucusing of opinions of judges, 1061, 1062 n.

MARCHANT, HENRY—

signed Articles of Confederation, 1697.

MARCY, WILLIAM L., SECRETARY OF STATE—

action of, on refusal of Dutch Minister to answer subpoena, 319.

MARQUE (see LETTERS OF MARQUE).

MARRIAGE (see HADDOCK v. HADDOCK)—

as a contract. 825.

MARSHALL, CHIEF JUSTICE—

described the Alexandria Conference, 44 n.

✓ on the Preamble and formation of the Constitution, 94-96.

✓ on implied powers, 117.

on direct taxes, 174.

on tax on income from bonds, 191.

✓ on power of the States to destroy the government, 244.

on taxing United States Bank, 398-402.

on commerce powers, 470-474, 483, 484.

on original packages, 511-516.

on State inspection laws, 567, 568.

on quarantine laws, 568.

✓ on power of Congress to charter banks, 573.

on naturalization, 616, 617.

on habeas corpus, 724.

on bills of attainder, 735.

on bills of credit of States, 766, 767.

on obligation of contracts, 781, 782.

defines contract, 786.

defines obligation of contracts, 790.

✓ on delegation of powers of President, 871.

issues subpoena for President Jefferson in Burr trial, 1012-1019.

✓ speech in Virginia Convention on independence of judiciary, 1080.

✓ on extent of judicial powers, 1088.

on what is a case, 1089.

on cases affecting ambassadors, 1098.

on citizenship, 1119.

○ on original jurisdiction of Supreme Court, 1126.

on treason, 1148.

✓ on power of the courts to annul laws, 1175.

✓ denies the power to annul laws as counsel in *Ware v. Hylton*, 1180.

✓ maintains the power to annul laws as Chief Justice in *Marbury v. Madison*, 1181-1184 n.

*References are to pages.***MARSHALL, CHIEF JUSTICE (continued)—**

- on the government of territories, 1203.
- ✓ on amendments to the Constitution, 1318.
- on religious tests, 1330.
- ✓ on the adoption of the first ten amendments, 1369 n.
- on the first ten amendments as a Bill of Rights, 1532.
- speech of, on suits against States in Virginia Convention, 1537.
- on the Eleventh Amendment, 1542.
- on a State as a party to a suit, 1544.
- ✓ on the implied powers of Congress, 1660.

MARTIN, ALEXANDER—

- delegate to Constitutional Convention, 61.
- failed to sign Constitution, 65.

MARTIN, LUTHER—

- on powers of delegates to Constitutional Convention, 49.
- member of Constitutional Convention, 60.
- failed to sign Constitution, 65.
- member of Committee of Eleven, 76, 233 n.
- on direct taxation, 175.
- opposed establishment of inferior federal courts, 669.
- counsel in *Fletcher v. Peck*, 781 n.
- on obligation of contracts, 791 n.
- opposed reelection of President, 863-865.
- avored long term for President, 867-869.
- author of "Confession in Open Court" clause in the Constitution, 1153.
- opposed the establishment of a "Council of Revision," 1173.
- letter from, to Maryland legislature, 1226.
- on treason against a State, 1225, 1227.
- on supreme law of the land, 1326.
- on conflict of oaths, 1332.

MARYLAND—

- delegates from, to first Congress, 2.
- instructed delegates to first Congress, 4.
- instructed delegates to oppose a declaration of independence, 20.
- represented in Annapolis Conference, 41-44.
- represented in Alexandria Conference, 45 n.
- instructions to members to Constitutional Convention from, 47.
- delegates to Constitutional Convention, 60.
- first Senators from, 225.
- taxed Bank of United States, 398-402.
- taxed importers, 481, 482, 490.
- ceded portion of District of Columbia to United States, 696 n.
- Constitution of, prohibited titles of nobility, 758.

References are to pages.

MARYLAND (continued)—

elected State Senators by electors, 886.
 ceded western lands to United States, 1256, 1258.
 ratified the Constitution, 1345.
 delegates from, signed Constitution, 1346, 1770.
 twenty-eight amendments to the Constitution proposed by minority party in, 1363.
 ratified the first ten amendments, 1368.
 freedom of the press in, 1405 n.
 right of petition in, 1407 n.
 speedy trial in, 1472.
 assistance of counsel for accused in, provided, 1488.
 ratified Corwin amendment, 1679.

MASON—

on Veto Power, 372-376.

MASON, JAMES W.—

expelled from Senate, 289.

MASON, JOHN Y., ATTORNEY GENERAL—

opinion of, on filling vacancies in recess of Congress, 989.

MASON, JUDGE—

on privileges of members of Congress, 1211.

MASON, GEORGE—

delegate to Constitutional Convention, 63.
 declined to sign Constitution, 65, 1347 n.
 member of Committee of Eleven, 76, 233 n.
 favored election of Representatives by the people, 131.
 opposed limiting suffrage to freeholders, 134-136.
 proposed twenty-five years as term for Representatives, 142.
 on election of Senators, 229, 230.
 on compensation of Congressmen, 303.
 on the veto power, 358.
 opposed issuance of paper money, 411-413.
 feared influence of monopolies in government affairs, 572.
 on the power to declare war, 678.
 on maintenance of the militia, 691.
 on long term for President, 868.
 favored election of President by Congress, 879, 880, 882.
 proposed a Privy Council, 927.
 on appointing power of the President, 967.
 on impeachment, 1030.
 author of "Aid and Comfort" clause in the Constitution, 1150.
 on amendments, 1304-1307.
 member of Grand Committee on State Debts, 1323 n.

*References are to pages.***MASON, GEORGE (continued)—**

- opposed ratification of the Constitution by the legislatures, 1341.
- on the omission of a Bill of Rights in Constitution, 1347.
- on suits against States, 1536.

MASSACHUSETTS—

- delegates from, to first Congress, 1.
- instructions to delegates, 3.
- delegates from, signed Articles of Confederation, 25, 1697.
- instructions to delegates to Constitutional Convention, 47.
- delegates from, signed Articles of Confederation, 25, 1697.
- first Senators from, 225 n.
- John Quincy Adams resigned as Senator from, 235.
- Charter of, received from Charles I, 1003.
- Constitution of, on tenure of judges, 1069.
- ceded lands to the United States, 1256-1258.
- ratified the Constitution, 1345, 1346, 1770.
- proposed nine amendments to the Constitution, 1363.
- ratified first ten amendments, 1368.
- freedom of the press in, 1405 n.
- right of petition in, 1407 n.
- right to speedy trial in, 1472.
- aid of counsel for accused in, 1488.

MASTER AND SERVANT—

- power of Congress over, 534.
- power of States over, 606.

MATTHEWS, JOHN—

- signed Articles of Confederation, 1698.

MATTHEWS, JUSTICE—

- on foreign corporations, 546.
- on State regulation of railways, 553.
- on issuance of bills of credit by States, 769.
- on power of Congress over territories, 1260.
- on a State as a party to a suit, 1544.
- on Fourteenth Amendment, 1613.

MAY—

- proposed for the opening of Congress instead of December, 277.

MEDALS—

- for departing ambassadors, 761 n.

MERCER, JOHN F.—

- delegate to Constitutional Convention, 60.
- failed to sign Constitution, 65.

*References are to pages.***MERCER, JOHN F. (continued)—**

- on Congressmen holding other offices, 48 n.
- opposed popular vote for Representatives, 136.
- on paper money, 411-413.
- opposed annulment of laws by Supreme Court, 1174.

MERCHANT MARINE—

- debate on, in Constitutional Convention, 464-466.

MESSAGES OF THE PRESIDENTS—

- developed from the provision requiring the President to give information to Congress, 998.
- Washington and Adams addressed Congress orally, 1000.
- Jefferson established the custom of sending written messages to Congress, 1000, 1001 n.

MEXICAN PEONAGE IN UNITED STATES—

- void under Thirteenth Amendment, 1588.

MEXICAN WAR—

- how declared, 680.

MEXICANS—

- may be naturalized, 619.

MEXICO—

- appointment of Ransom as minister to, 336.
- cession of territory by, to the United States, 1252, 1271-1273.

MICHIGAN—

- Bible in public schools in, 1393.
- public trial in, 1476.
- election of Presidential electors by districts in, 1568.

MIDDLETON, HENRY—

- President of first Colonial Congress, 206.

MIFFLIN, THOMAS—

- member of first Colonial Congress, 2.
- delegate to Constitutional Convention, 62.
- President of Second Colonial Congress, 206.
- signed the Constitution, 1346, 1770.

MIGRATION AND IMPORTATION OF PERSONS—

- when could be prohibited, 715, 716.

MILEAGE—

- allowed members of Congress, 305.

References are to pages.

MILITIA—

- definition of, 690.
- power to call out the, 689-691.
- causes for calling out the, 690.
- arming and drilling the, 691.
- Hamilton on the, 692.
- right of States to maintain, 693, 694, 844.
- President as commander of, in time of war, 920.

MILLER, WILLIAM H.—

- opinion of, as attorney general on adjournment of Congress, 370.

MILLER, JUSTICE—

- on the Virginia trade laws, 39, 40.
- on right to vote for Representatives, 139, 140.
- on Civil War taxes, 177.
- on power of Speaker of the House of Representatives, 204.
- on control of elections by Congress, 274.
- on the yea and nay vote in Congress, 295.
- on adjournment of either branch of Congress beyond three days, 299.
- on privileges of Congressmen, 313.
- on freedom of debate, 327.
- on taxation for revenue, 350.
- on use of the veto power, 375.
- definition of excises by, 389.
- on uniform taxes, 407, 408.
- on legal tender power, 428-435, 440, 441, 444-447.
- on opinions of Supreme Court on interstate commerce, 454 n, 477 n.
- on use of term "regulation," 477 n.
- on wharves, 502.
- on trade marks, 664, 666.
- on bills of attainder, 738.
- on ex post facto laws, 745.
- on obligation of contracts, 790, 797, 798, 812-814.
- "Law of a State," definition of, by, 805.
- on impairment of obligation of contracts by Congress, 830.
- on imports and exports, 839.
- on President's term of office, 870 n.
- on President as commander in chief, 920 n.
- on the pardoning power of the President, 937-939.
- on appointments by the President, 971.
- on appointments in recess of Congress by the President, 996, 997.
- on extra sessions of Congress, 1002.
- on Ellsworth as author of the judiciary act of, 1789, 1054 n.
- on the judicial system, 1067.

*References are to pages.***MILLER, JUSTICE (continued)—**

- on the abolishment of inferior courts, 1075.
- on judicial power, 1085, 1086, 1088.
- on law and equity, 1091.
- on when "a case" arises under the Constitution, 1093.
- on "cases" under the laws of the United States, 1095, 1096.
- on admiralty, 1102.
- on controversies between States, 1111-1121.
- on rights of citizens of one State in other States, 1218.
- on the taking of private property, 1463.
- on jury trial, 1491-1493.
- on suits against sovereignties, 1540.
- on the election of electors, 1569, 1570.
- on involuntary servitude, 1587.
- on civil rights, 1590.
- on citizenship in State and United States, 1608-1612, 1618, 1620.
- citizenship defined by, 1610.
- on privileges and immunities of citizens, 1611.
- on equality under the Fourteenth Amendment, 1633.
- on abolishment of color line by Fifteenth Amendment, 1673.

"MILLIONS FOR DEFENSE"—

- Pinckney, Charles C., author of phrase, 62.

MINISTERS OF UNITED STATES—

- how appointed, 967, 972.
- definition of, 1099, 1100.

MINORITY REPRESENTATION IN CONGRESS—

- denial of, 274.

MINOT, GEORGE R.—

- letter of Fisher Ames to, 1364 n, 1368 n.

MINT OF THE UNITED STATES—

- proposed by Robert Morris, 635.
- established by the government, 635.
- David Rittenhouse, first director of, 637.
- half dimes first money coined by, 637.

MISCONDUCT IN OFFICE—

- an impeachable offense, 1033-1035.

MISSISSIPPI—

- bills of credit in, 768.
- charter to lottery annulled in, 826.

MISSOURI—

- constitutionality of local option fines in, 1512.
- counting of electoral vote of, 1821, 1570.

References are to pages.

MITCHELL, CHARLES B.—

expelled from Senate, 289.

MONARCHY—

Jefferson on establishment of, 1562.

latent force of, 1359.

MONEY (see COINAGE, BILLS OF CREDIT, CURRENCY, MINT).

MONEY BILLS—

phrase suggested by Charles Pinckney, 343.

must originate in House of Representatives, 342-350.

changed to revenue bills, 345.

MONOPOLY—

Brewer, Justice, on, 575.

MONROE, JAMES—

on Annapolis Conference, 43 n.

Bancroft's sketch of, 457 n.

opposed control of elections by Congress, 272.

vetoed by, as President, 376.

vetoed Cumberland Road Bill, 392.

opposed internal improvements, 643, 645.

on post roads, 654 n.

absences from the capital while President, 1011 n.

MONTAGUE MANTEL TRUST CASE—

Montague v. Lowry, 588.

MOODY, JUSTICE—

on testifying against one self, 1443.

on involuntary servitude, 1589.

on due process of law, 1612, 1624.

MORANDO—

privilege of, 311.

MORGAN, JOHN F.—

on President's discretion in exercising his veto, 374.

MORRILL, JUSTIN S.—

member of Reconstruction Committee, 1597.

MORRIS, GOUVERNEUR—

delegate to Constitutional Convention, 62.

member of Committee on Style, 90.

avored election of Representatives by freeholders, 133.

feared corruption in the United States as result of general suffrage,
134.

opposed denying suffrage to debtors of the United States, 145.

on apportionment for Representatives, 168, 170.

*References are to pages.***MORRIS, GOUVERNEUR (continued)—**

- proposed three Senators from each State, 234.
- on presidency of the Senate, 252.
- avored Congress meeting in May, 277.
- opposed compensation of Senators, 304.
- on Congressmen holding other offices, 334.
- opposed Congress emitting bills of credit, 410-412.
- on regulation of trade, 464, 465.
- opposed the establishment of a national bank by Congress, 573 n.
- on the militia, 690.
- on habeas corpus, 723.
- inserted obligation of contract clause in the Constitution, 775, 776, 779.
- avored life term for President, 864, 865.
- avored election of President by electors chosen by the people, 880-885.
- proposed a Council of State, 926, 927.
- secured provision in the Constitution for increase of compensation of judges during their term, 1078, 1079.
- on treason, 1147.
- full faith and credit clause in Constitution attributed to, 1193-1195.
- Randolph and Morris proposed definition for treason, 1223.
- author of clause to admit new States into Union, 1245, 1248.
- on government of Territories, 1258.
- on amendments to the Constitution, 1303.
- on equal power of the States in the Senate, 1307.
- on oaths of allegiance, 1333 n.
- moved to refer Constitution to a general convention for ratification, 1341.
- opposed change in election of President by Twelfth Amendment, 1556 n, 1558.

MORRIS, ROBERT—

- nominated Washington for chairman of Constitutional Convention, 57, 58.
- delegate to Constitutional Convention, 62.
- signed Declaration of Independence, 64.
- member of first Senate, 225.
- avored the establishment of a national bank, 573 n.
- on a mint and decimal coinage, 635, 636.
- opposed Senate passing on removals from office, 978.
- signed the Constitution, 1347, 1770.
- opposed the first amendments to the Constitution, 1367.
- signed the Articles of Confederation, 1698.

References are to pages. .

- MORTON, OLIVER P.—**
 part taken by, concerning the fifteenth amendment, 1670.
- MORTON, JOHN—**
 member of first Colonial Congress, 2.
- MUHLENBERG, FREDERICK—**
 first Speaker of the House of Representatives, 204.
- MUTINY OF TROOPS—**
 caused removal of Congress from Philadelphia, 698.
- MYSTERY OF PINCKNEY DRAFT OF CONSTITUTION, 73, 91 n.**

N.

- NAPOLEON—**
 purchase of Louisiana from, 1265.
- NAPOLEON'S CODE—**
 on taking of private property, 1459.
- NATIONAL CONVENTIONS—**
 history of, 1575, 1576.
- NATIONAL ROAD—**
 power of the government to construct the, 489, 577.
- NATIONAL UNIVERSITY—**
 efforts to establish a, 611.
 favored by Washington, 611 n.
- NATIONAL GUARD—**
 right of States to maintain a, 844.
- NATIONAL BANKS—**
 power of Congress to establish, 573, 573 n.
 favored by Hamilton and Robert Morris, 573 n.
 bills of, defined, 640, 641.
- NATIONAL EXECUTIVE—**
 title for President suggested by Randolph, 850.
- NATIONAL DOMAIN—**
 power of Congress over discussed, 1263-1281.
- NATURALIZATION—**
 under the Articles of Confederation, 613.
 State laws on, 613.
 Madison's views concerning, 613, 614.
 Charles Pinckney author of clause in Constitution, 612, 615.
 power over, vested in Congress, 615.
 Marshall, Chief Justice, on, 616.
 by treaty, 617.
 by joint resolution of Congress, 617.

References are to pages.

NATURALIZATION (continued)—

- who may be refused, 618, 619, 1600 n.
- who may be naturalized, 619.
- why Congress has jurisdiction over, 620.
- State can confer only State citizenship, 621.
- opinion of Taney, Chief Justice, on, 621.
- relation of Fourteenth Amendment to, 1614, 1619.
- State and national citizenship, 1614.

NATURE OF ACCUSATION—

- accused entitled to know, 1481.

NAVAL OFFENSES—

- Congress can punish, 687, 688.

NAVIGATION ACT FOR VIRGINIA, 40 n.

NAVY DEPARTMENT—

- establishment of, 687.
- subject to regulation of Congress, 688, 689.

NAVY—

- under the Articles of Confederation, 29, 687.
- Congress has power to establish and maintain a, 686, 689.
- President as commander in chief of, 911, 919.

NECESSARY POWERS OF CONGRESS, 701, 709, 713 n, 714 n.

"NECESSARY AND PROPER"—

- Gray, Justice, on meaning of, 708.
- Webster on, 709.
- Calhoun on, 709.
- Jefferson on, 709 n.
- Paschal on, 710.

"NECESSARY AND PROPER LAWS"—

- Congress has power to make, 701.
- Hamilton on, 702, 704.
- Madison on, 704, 707.
- Marshall on, 707.
- Blatchford on, 707.
- Taney on, 708.

NEGROES—

- patents secured by, 662 n.
- in theaters, 1590.
- act of Congress admitting, to theaters annulled, 1663.

NELSON, ———

- member of Committee on Articles of Confederation, 23, 1047 n.

NELSON, JOHN—

- refused to serve in Constitutional Convention, 64.

References are to pages.

NELSON, JUSTICE—

- defined term "Constitution," 109.
- on preference to ports, 752.
- on reserved rights of the States, 1528.

NEVADA—

- suppression of insurrection in, 1296-1301.

NEW HAMPSHIRE—

- delegates from, in first Colonial Congress, 1.
- instructions to delegates from, 3.
- signed Articles of Confederation, 25, 1697.
- first State to ratify the Constitution, 122.
- first Senators from, 225.
- governor of called "The President," 851.
- good behavior tenure of judges in, 1069.
- on amendments to the Constitution, 1303.
- ratified the Constitution, 1311.
- delegates from, signed Constitution, 1345, 1770.
- proposed twelve amendments to the Constitution, 1363.
- ratified amendments to the Constitution, 1368.
- demanding religious freedom under Constitution, 1375 n.

NEW JERSEY—

- delegates from, to first Colonial Congress, 2.
- delegates from, to Annapolis Conference, 32.
- instructed delegates to Constitutional Convention, 46.
- delegates from, opposed a national government, 75.
- first Senators from, 225.
- attempted recall of ratification of Thirteenth Amendment, 1313.
- ratified Constitution, 1314.
- ratified original amendments to the Constitution, 1368.

NEW STATES—

- admission of, into the Union, 1245, 1255.
- clause in Constitution concerning, attributed to Gouverneur Morris and Dickinson, 1245.
- Jefferson on, in the Northwest, 1246.
- Pinekney's speech on, 1247 n.
- to have equal rank with old States, 1248.
- how a Territory becomes a State, 1250.
- Congress can admit no political division less than a State to the Union, 1251.
- opinion of Attorney General Bates on admission of West Virginia, 1251.
- mode of admission of, 1253.

*References are to pages.***NEW YORK—**

delegates from in first Colonial Congress, 1.
 instructions to delegates from, 3.
 delegates from declined to vote for Declaration of Independence, 20.
 signed the Articles of Confederation, 25, 1697.
 sent delegates to Annapolis Conference, 42.
 instructed delegates to Constitutional Convention, 47.
 majority of delegates to Constitutional Convention withdrew, 61-64.
 members of first Senate from, 225.
 senatorial rotation in, 242.
 signing bills by governor of, 368.
 governor of, commander in chief, 912.
 Council of Revision in, 1171 n.
 attempted to recall ratification of Fifteenth Amendment, 1313.
 ratified the Constitution, 1345.
 proposed thirty-two amendments to the Constitution, 1363.
 ratified the original amendments, 1368.
 demanded religious freedom under the Constitution, 1375 n, 1395.

NEW YORK CITY—

mayor of annulled a law, 1169.

NICARAGUA CANAL COMPANY—

chartered by Congress, 576.

NICKELSON, A. O. P.—

expelled from the Senate, 289.

NINTH AMENDMENT—

history of, 1523, 1524.

NOBILITY, TITLES OF—

not to be granted by the United States, 757.
 not to be granted by any State, 764.

NOLLE PROSEQUI—

when may be entered, 1441.

NORMANS—

jury trial under, 1140, 1497.

NORTH CAROLINA—

sent delegates to first Colonial Congress, 1.
 instructed delegates to Constitutional Convention, 47.
 delegates from to Constitutional Convention, 61.
 withdrawal of delegates from Constitutional Convention, 64.
 members of first Senate from, 225.
 first State favorable to corporations, 577.

References are to pages.

NORTH CAROLINA (continued)—

- ratified Constitution, 1346.
- delegates signed the Constitution, 1348, 1771.
- proposed twenty-six amendments to the Constitution, 1363.
- ratified original amendments to the Constitution, 1368.
- demanding religious freedom under the Constitution, 1375 n.
- demanding freedom of the press under the Constitution, 1405 n.
- demanding right of petition under the Constitution, 1407 n.

NORTH DAKOTA—

- change in law of, concerning the execution of criminals not *ex post facto*, 742.

NORTHERN SECURITIES TRUST CASES, 548, 578, 590, 592.

NORTHUMBERLAND, EARL OF, 218, 219.

NORTHWEST TERRITORY—

- qualifications of officers in, 304.
- prohibition in, against States interfering with obligation of contracts, 775.
- efforts to establish ten States in, 1245, 1246.
- slavery excluded from, by Ordinance of 1787, 1246.
- government of, 1264.

NORWAY—

- suit against consul from, 1124.

NOTT, CHIEF JUSTICE—

- on mystery of Pinckney draft, 73, 75 n, 91 n.

NUISANCE—

- State may abate, 1116, 1127.

NULLIFICATION, 1178, 1179.

O.

OAKLEY, T. J. —

- Wirt's letter concerning, in *Gibbons v. Ogden*, 470.

OATH—

- must be taken by Senators in impeachment trials, 262.
- of President, 907-910 n.
- Jefferson on obligation of, 910.
- of Justices of Supreme Court, 1054.
- necessary in swearing out search warrants, 1424.
- of allegiance, of whom required, 1332, 1334.
- of allegiance, prescribed by Act of 1789, 1334.
- taking of is mandatory, 1337.

References are to pages.

OBSCENE PUBLICATIONS—

- subject to regulation, 603.
- may be excluded from mails, 649, 1403.

OBLIGATION OF CONTRACTS—

- States cannot impair, 774-804.
- obligation defined by Pothier, 788.
- Miller, Justice, on, 790.
- Marshall, Chief Justice, on, 790.
- Washington, Justice, on, 791, 794.
- impairment of, 797.
- Congress may impair, 829-834 n.

O'CONNOR, CHARLES—

- counsel for Jefferson Davis in trial for treason, 1473.

ODO, THE BISHOP, 1498.

OFFICERS OF THE HOUSE OF REPRESENTATIVES, 202, 204.

OFFICERS OF THE SENATE, 255.

OFFICERS OF THE UNITED STATES—

- impeachment of, 266, 268, 1027, 1037.
- appointment of, by President, 967.
- who are not, 972.
- appointment of inferior officers, 973.
- commissioned by President, 1006.
- religious tests as a qualification for office forbidden, 1338.

OHIO—

- attempted to recall ratification of the Fourteenth Amendment, 1313.
- Bible in the public schools in, 1389, 1392.

OPENING DAY OF CONGRESS, 275.

OPINIONS OF CABINET OFFICERS—

- may be required in writing by the President, 923-934.

OPPRESSION IN GOVERNMENT—

- danger of, 1358.

ORDEAL—

- trial by, 1136.

ORDINANCE OF 1787—

- prohibited States in northwest territory interfering with obligation of contracts, 775.
- Chief Justice Chase on, 1263.
- jury trials in, 1500.
- prohibited slavery in northwest territory, 1583.
- attacked by Calhoun, 1633 n.

References are to pages.

OREGON—

time of choosing Representatives in, 278.

hours of labor for women in, 1629.

ORIGIN OF CONSTITUTION—

who first suggested the Constitution, discussed, 80-88.

ORIGINAL JURISDICTION OF SUPREME COURT—

discussed, 1122-1127.

ORIGINAL PACKAGES—

Marshall, Chief Justice, on, 511.

Brown, Justice, on, 512-516.

ORIGINAL GRANTS OF POWER—

Monroe on, 397.

ORR, JAMES R.—

Speaker of the House of Representatives, 205.

ORTH, G. S.—

introduced resolution on Trusts in House of Representatives, 561.

OTIS, HARRISON GRAY—

credits Hamilton with first suggesting the Constitution, 85.

OTIS, JAMES—

Declaration of Independence attributed to, by John Adams, 16 n.

favored a Congress to oppose Stamp Act, 121.

opposed writs of assistance, 1415-1418.

OVERT ACTS OF TREASON—

conviction of, 1152.

what are, 1153.

OWSLEY, JUDGE—

on legal tender, 795.

P.

PACA, WILLIAM—

member of first Colonial Congress, 2.

member of Court of Appeals in cases of capture, 1044.

PACKAGE, ORIGINAL—

what is an, considered, 512, 516.

Marshall, Chief Justice, on, 511.

Brown, Justice, on, 512-516.

PACKING HOUSES—

not arbitrarily classified under the Fourteenth Amendment, 1646.

PAGE, JOHN—

member of committee on title for President, 852 n.

References are to pages.

PAGE, WILLIAM HERBERT—

on contracts, 802.

PAINE, ROBERT TREAT—

member of first Colonial Congress, 1, 26.

member of committee on captures, 1043.

PAINE, THOMAS—

claimed to be the first to propose a national government, 85.

on the Louisiana purchase, 1267-1269.

PANDECTS—

as the source of the writ of habeas corpus, 721.

PAPERS, PRIVATE—

protected against search and seizure, 1414-1430.

Bradley, Justice, on, 1419, 1423.

papers of corporations and distillers subject to inspection, 1423-1426.

letters and packages in the mails, 1425, 1426.

PAPER MONEY—

debate on in Convention, 410, 416.

PARDONS BY PRESIDENT—

President's power of pardon cannot be controlled by Congress, 937.

definition of pardon, 937.

PARIS—

treaty of, 31, 949.

PARSONS, CHIEF JUSTICE—

on freedom in debate, 326.

PARTY CONVENTIONS—

first to name a President held in 1831, 1576.

Hamilton's fear of, 1577.

PASCHAL—

on apportionment, 169.

on classifying new Senators, 246.

on powers of Congress, 710.

on oath of President, 909.

on state of the Union, 1000.

on execution of the laws, 1004.

on judicial power, 1086.

on the "establishment" of a religion, 1376 n.

on Ninth Amendment, 1523.

PATENTS—

Charles Pinckney, author of clause on, in the Constitution, 660.

definition of, 660.

References are to pages.

PATENTS (continued)—

- under Colonies, 661.
- Jefferson father of patent system, 661.
- Jefferson's inventions, 661, 662.
- bureau of, opened, 662.
- bureau of, placed under interior department, 662.
- life of, 662.
- laws regarding, 663.

PATERSON, JUSTICE—

- on weakness of the Articles of Confederation, 34.
- denied right of Constitutional Convention to frame a Constitution, 53.
- delegate to the Constitutional Convention, 59, 60.
- presented plan of a Constitution to the Convention, 68, 77.
- member of Committee of Eleven, 76, 233.
- on the meaning of "A Constitution," 108.
- on legislative power, 113.
- proposed name "Congress," 125.
- on provision for apportionment of Representatives, 163-165.
- member of first Senate, 225.
- on taxation, 385.
- on duties and taxes, 388.
- on regulation of trade and commerce, 459.
- called President "Federal Executive" in his plan of a Constitution, 851.
- avored election of President by Congress, 875.
- opposed President assuming military command, 919.
- opposed Senate passing on removals from office, 978.
- appointed justice of Supreme Court, 1054.
- on annulment of laws, 1180.

PAVING OF STREETS—

- by street railways, 821.
- by resident and non-resident property owners, 1647.

PEARSON, JUDGE—

- on habeas corpus, 723, 729, 730.

PECK, JUDGE—

- impeachment of, 211.

PECKHAM, JUSTICE—

- on privileges of Congressmen, 308.
- on debts of the United States, 405.
- on corporate combinations, 584.

*References are to pages.***PECKHAM, JUSTICE (continued)—**

- on the right to earn a livelihood, 607.
- on bills of credit of States, 771.
- on foreign corporations, 817.
- on removals from office, 984.
- on the Fourteenth Amendment, 1628.

PEDOMETER—

- invented by Jefferson, 662 n.

PEELE, CHIEF JUSTICE—

- on vacancy in office in recess of Congress, 988.

PEERS—

- created to defeat bills, 362 n.

PEMBROKE, EARL OF, 218.**PENDLETON, NATHANIEL—**

- refused to serve in Constitutional Convention, 64.

PENDLETON, EDMUND—

- member of first Colonial Congress, 2.

PENN, JAMES—

- signed Articles of Confederation, 1698.

PENN, WILLIAM—

- charter of, in Pennsylvania, 283, 284.
- plan of Union of, 912.

PENNINGTON, WILLIAM—

- Speaker of the House of Representatives, 205.

PENNSYLVANIA—

- delegates from, in first Colonial Congress, 2.
- instructions to delegates, 4.
- opposed Declaration of Independence, 20.
- delegates signed Articles of Confederation, 25.
- sent delegates to Annapolis Conference, 42.
- delegates from, in Constitutional Convention, 61, 62.
- members from, in first Senate, 225.
- governor of, called "President," 851.
- Wilson's speech in Constitutional Convention of, on the federal judiciary, 1160 n, 1167.
- ratified the Constitution, 1345 n.
- ratified first ten amendments, 1368.
- minority members in Convention proposed fourteen amendments to Constitution, 1363.

References are to pages.

PEONAGE—

forbidden by the Thirteenth Amendment, 1588.

PERFECT UNION—

an object of the Preamble, 99.

PERKINS, CHARLES E.—

on the power to summon the President, 1013 n.

PERSONAL LIBERTY—

guaranteed by the Fourteenth Amendment, 1414, 1430.

forbids unreasonable search and seizure, 1414.

warrants can be issued only on probable cause, 1414.

history of writs of assistance, 1414, 1419.

probable cause, what is, 1425.

letters and sealed packages protected, 1425.

arrest made only by warrant or after escape, 1427.

suspicious persons, arrest of illegal, 1427.

testimony before Interstate Commerce Commission, 1428.

aliens under Fourth Amendment, 1429.

right of action under Fourth Amendment, 1430.

PERSONS—

when term includes corporations, 1635.

PETERS, JUDGE—

on annulment of laws, 1180 n.

PEYTON, JUDGE—

on oaths, 1337.

PETITION OF RIGHT AND CHARLES I—

Hamilton on, 1354.

PHILADELPHIA—

meeting of Congress in, 1, 12, 122.

call for Constitutional Convention in, 41-44 n.

Constitutional Convention met in, 57.

PHILIPPINE ISLANDS—

power of Congress to grant charters in, 575.

acquisition of, 1252.

second jeopardy in, 1441, 1442.

PICKERING, TIMOTHY, SECRETARY OF STATE—

letter of John Adams to, 2, 14, 16-19.

on the Declaration of Independence, 17 n.

References are to pages.

PICKERING, JUDGE—

refused to serve in Constitutional Convention, 64.
impeachment of, 211, 218.

PIERCE, FRANKLIN—

vetoes by, as President, 376.

PIERCE, WILLIAM—

delegate to Constitutional Convention, 59.
failed to sign the Constitution, 65.
favored three years for Senatorial term, 230.

PIERS—

control of Congress over, 501 n.

PILOTAGE LAWS—

power to enact, left to States, 490, 492.

PINCKNEY, CHARLES—

delegate to Constitutional Convention, 62.
presented plan for a Constitution, 66.
history of his draft of a Constitution, 67 n, 77.
Chief Justice Nott on plan of Pinckney's draft, 73 n-75, 91 n.
Preamble in plan of, 90.
on division of the government into three branches, 110.
on legislative power, 113.
called House of Representatives "House of Delegates," 125, 130.
on provisions for apportionment, 163.
on election of Senators, 227.
on officers of Senate, 256.
speech on attendance of Congressmen, 281.
author of provision on rules, 285.
favored payment of Congressmen by the States, 302.
on ineligibility of Congressmen to office, 332-334.
favored revenue bills originating in both houses, 333, 334.
on veto power, 356.
on taxation, 381-385.
on power to borrow money and emit bills of credit, 410.
on regulation of commerce, 458.
on the five commercial interests of the States, 463.
favored establishment of a national university, 611.
author of naturalization clause in Constitution, 612.
author of bankruptcy clause in Constitution, 630.
author of clause concerning patents in Constitution, 659, 660.
favored establishment of inferior courts, 667.
on piracies, 672.
on power of Senate to declare war, 676, 678.
on letters of marque, 681, 682.

References are to pages.

PINCKNEY, CHARLES (continued)—

- on power to raise armies, 864.
- on seat of government, 696.
- on slave trade, 717, 718.
- on writ of habeas corpus, 723.
- author of clause in Constitution prohibiting officers of the United States accepting presents or titles, 758.
- suggested title of "President" for Chief Executive, 850.
- proposed a single executive, 855, 857.
- on power of President, 854 n.
- on election of President, 865, 868, 876, 879, 882.
- on property qualifications for President, Judges and Congressmen, 889-891 n.
- predicted formation of cabinet, 924.
- proposed a Council of State, 926.
- on the Senate making treaties, 950.
- proposed messages to Congress by the President, 998.
- opposed impeachment of President, 1028, 1029.
- member of committee on court of appeals, 1045.
- on jurisdiction of Supreme Court, 1082.
- proposed jury trial in criminal cases, 1134.
- defined treason, 1146.
- on power of Supreme Court to annul laws, 1177.
- author of privileges and immunities clause, 1205.
- on citizenship and naturalization, 1209 n.
- author of clause on fugitives from justice, 1223, 1224.
- on new States, 1246.
- on amendments to the Constitution, 1303.
- on clause concerning religious tests, 1338 n, 1375.
- on freedom of the press, 1400, 1401.
- signed the Constitution, 1349, 1771.
- text of his plan of a Constitution, 1702.

PINCKNEY, CHARLES C.—

- delegate to Convention, 62.
- author of phrase "Millions for Defense," 62.
- on election of Senators, 229.
- opposed paying Senators, 304.
- opposed revenue bills originating in Senate, 344.
- on duties and imposts, 383.
- on commerce, 464.
- member of Grand Committee on State Debts, 1323.
- concerning religious tests, 1338 n.
- signed Constitution, 1349, 1771.
- opposed bill of rights, 1353 n.

References are to pages.

PIRACY—

- power of Congress to punish, 670-676.
- definition of, 671.
- Ellsworth author of clause in Constitution concerning, 673.

PITT, WILLIAM (see CHATHAM).

PLANS OF UNION—

- of Galloway, 10, 11.
- of Franklin, 21, 22, 80 n.
- of Penn, 912.

POLICE POWER—

- considered, 596-611.
- not contemplated in the Constitution, 596.
- definition of, 599.

POLK, JAMES K.—

- Speaker of the House of Representatives, 205.
- vetoed by, as President, 376.
- absences from capital while President, 1011.

POLYGAMISTS—

- cannot be naturalized, 1600 n.

POPULAR GOVERNMENT—

- political power of, where vested, 1359.

PORTLAND, EARL OF, 219.

PORTS—

- preference between, prohibited, 751.

PORTS OF ENTRY—

- control of Congress over, 753.

POSTMASTER GENERAL—

- Franklin first, 12.
- made member of cabinet by President Jackson, 933.

POST OFFICE DEPARTMENT—

- established by first Colonial Congress, 12, 641.
- Franklin first postmaster general, 12.
- under Articles of Confederation, 29, 641, 652.
- development of, 650.
- power of eminent domain of, 651.

POST ROADS—

- definition of, 649, 650.
- control of Congress over, 643.
- when existing roads may be used as, 651.

References are to pages.

POTHIER—

on obligation, 788.

POWER OF SPEAKER—

of House of Representatives, 204, 205.

**POWER OF CONGRESS TO LEGISLATE (see LEGISLATIVE POWER,
EXPRESS POWER, CONGRESS)—**

Paschal and Hamilton on, 384, 385.

PREAMBLE TO CONSTITUTION—

history of, 89.

author of, 91.

when adopted in Convention, 91.

Chief Justice Fuller on, 92.

Harlan, Justice, on, 92.

objects of, 99, 104.

PRESIDENT OF THE UNITED STATES—

has no power to declare war, 677.

executive called "President" by Charles Pinckney, 850.

governors in some States called "President," 851.

Madison on organization of executive department, 853 n.

great authority vested in the, 854.

single executive decided on, 854.

Farrand Max on, 855 n.

tenure of term of, 867.

four years agreed on for term of, 870.

Miller, Justice, on term of, 870 n.

election of, 875, 888.

Randolph and Paterson favored election of, by Congress, 875.

Hamilton on election of, 875.

Gerry favored election of, by governors of the States, 875.

Morris favored election of, by the people at large, 876.

election of, by electors, 878, 885.

mode of election of, suddenly adopted in convention, 1580 n.

Kent and Adams on election of, 886, 886 n.

qualifications of electors for, 887.

election day of, determined by Congress, 888.

qualifications of, 888, 891 n.

property qualifications for debated, 889 n.

succession to the Presidency, 891, 902.

resignation of, defined by statute, 891 n.

Vice-President to succeed, when, 891.

inability of, 892.

manner of declaring inability of, 893, 894.

order of succession to Presidency, 896, 897.

Tucker on order of succession to Presidency, 898.

References are to pages.

PRESIDENT OF THE UNITED STATES (continued)—

- Black and Curtis on order of succession, 899, 900.
- mode of electing, why and how changed by Twelfth Amendment, 1553-1581.
- compensation of, 902-907.
- Franklin opposed compensation of, 903 n.
- Hamilton on compensation of, 906.
- oath or affirmation of, on taking office, 907, 910.
- taking of oath by, mandatory, 908.
- commander in chief of army and navy, 911.
- power of, as commander in chief, 911, 919.
- war power of, 913 n.
- commander of militia, when, 920-922.
- may call out militia when needed, 921.
- may require opinions in writing of heads of departments, 923-934.
- relation of, to his cabinet, 923-933.
- early cabinets of, 927 n.
- President Hayes on power of, 931 n.
- can pardon for offense against United States, 935.
- cannot pardon for contempt of court, 941-945.
- cannot pardon in case of impeachment, 945.
- can issue proclamation of amnesty, 946, 947.
- power of, to make treaties, 948-967.
- power of, to nominate ambassadors, ministers and judges, 967-972.
- power of, to fill vacancies during recess of Senate, 988.
- relations of, with Senate concerning appointments by, 995.
- Madison on power of, to fill vacancies, 995 n.
- veto power of defined, 353.
- bills and joint resolutions which pass Congress must be approved by, 363.
- return of bills to Congress by, 364-366.
- effect of expiration of Congress on veto of, 369.
- reasons of, for vetoing a bill, 372-376.
- veto of bill cannot be recalled by, 375.
- messages of, 998.
- must give Congress information as to state of the Union, 998.
- may convene Congress in extraordinary session, 1002.
- duty of, to receive ambassadors, 1003.
- duty of, to execute the laws, 1003, 1006.
- impeachment of, 1027-1037.
- for what offenses, may be impeached, 1032, 1033.
- Adams, John Quincy, on abuse of veto power by, 1034.
- Madison on impeachment of, 1034, 1035.
- amendments to Constitution need not be approved by, 1318.
- order of, under act of Congress when held no defense for arrest, 1430.

References are to pages.

PRESIDENTS OF COLONIAL CONGRESS, 206, 207.

PRESIDENT OF SENATE—

Vice-President is President of, 253.
may administer oaths to Senators, 1334.

PRESIDENT PRO TEMPORE OF THE SENATE—

the Senate elects the, 255.
John Langdon the first, 255 n.

PRESIDENT GENERAL—

name for Executive in Galloway's plan, 10.

PRESS (see FREEDOM OF PRESS).

PRIVATE RIGHTS—

of what they consist, 144.
invasion of, 1358.

PRIVATEERS—

power of President over, 681-683.

PRIVILEGE OF MEMBERS OF CONGRESS—

discussed, 306-331.

PRIVILEGE—

of habeas corpus, 723, 724.

PRIVILEGES AND IMMUNITIES OF CITIZENS OF EACH STATE—

guaranteed to citizens in the several States, 1208-1211.
Washington, Justice, on, 1213-1215.
Brannon, Judge, on, 1215, 1216.
Miller, Justice, on, 1219.
extent of privileges and immunities under this clause, 1219, 1220.
citizens in this clause includes only natural persons, 1217, 1220,
1221 n.

PRIVY COUNCIL—

rejection of a, by Constitutional Convention, 231 n.
proposed by Mason, 927.

PRIZE CASES—

during the Revolution, 1039.

PRIZES IN WAR—

laws regulating, 681-683.

PROBABLE CAUSE—

what is, 1425.

PROCEEDINGS AND RULES OF CONGRESS—

determined by each House, 285.

References are to pages.

PROPERTY—

- acquisition of, the object of society, 1456.
- compensation for when taken, 1458.
- what is taking private, 1463-1465.
- what is not taking private, 1465-1469.
- classification of abutting, for taxation, 1647.

PROPERTY QUALIFICATIONS—

- for President, members of Congress and Judges, considered in convention, 889, 890 n.

"PROTECTOR OF LIBERTIES"—

- title proposed for President, 852.

PROVISIONAL COURTS—

- established by President Lincoln, 916-918.

PUBLIC DEBT OF THE UNITED STATES—

- interest on, how provided for, 350.
- validity of, not to be questioned under Fourteenth Amendment, 1657.

PUBLIC LANDS—

- power of Congress over, 1255-1260.

PUBLIC RIGHTS—

- of citizens, 144.

PUBLIC SAFETY—

- suspension of writ of habeas corpus in relation to, 730.

PUBLIC TRIAL—

- guaranteed by Sixth Amendment in criminal prosecutions, 1472-1489.
- defined, 1476.

PUBLICITY OF ACCOUNTS AND EXPENDITURES—

- debate on in Convention, 756, 757.

PUNISHMENTS—

- cruel and unusual, forbidden by Eighth Amendment, 1510.

Q.

QUALIFICATIONS—

- for Representatives in Congress, 142-161.
- for Senators, 246-250.
- for President, 888, 889.
- not prescribed for federal judges, 1167.

QUARANTINE LAWS (see POLICE POWER).

References are to pages.

QUARTERING OF TROOPS—

in time of peace, in houses without consent of owner forbidden by the Third Amendment, 1412.

in time of war, according to law, 1412.

QUAY, MATTHEW S.—

election case of, 246.

QUEEN ANNE—

last sovereign to veto a bill in England, 355.

QUESTIONING MEMBERS OF CONGRESS, FOR SPEECHES MADE—

prohibited, 322.

QUINCY, JOSIAH—

on the purchase of Louisiana territory, 1281 n.

QUORUM—

in impeachment trials, 264.

majority in each branch constitutes a, 282.

how obtained in Pennsylvania Convention to ratify the Constitution, 1346 n.

QUORUM CLAUSE IN CONSTITUTION—

proposed by Daniel Carroll, 359.

rule on in Senate, 366.

R.

RAILWAY RATES—

power of Congress over, 503, 504.

power of Interstate Commerce Commission over, 536-540.

message of President Grant concerning bill to regulate, 582.

RAILWAYS—

power of States over, 553, 602-604, 822.

State regulation of heating of trains, 544.

State regulation of stopping of trains, 555.

State regulation of Sunday trains, 560-563.

RALEIGH, SIR WALTER—

impeachment of, 222.

RANDALL, SAMUEL J.—

Speaker of the House of Representatives, 502, 506.

on rules of the House of Representatives, 285.

RANDOLPH, EDMUND—

delegate to Annapolis Conference, 39.

submitted plan for a Constitution to the Convention, 52, 53 n, 65.

delegate to the Convention, 63.

*References are to pages.***RANDOLPH, EDMUND (continued)—**

- declined to sign the Constitution, 65, 1350.
- member of Committee of Detail, 76.
- favored biennial elections for Representatives, 127.
- favored popular election to House of Representatives, 130.
- provision in plan of Constitution of, for apportionment of Representatives, 163.
- favored election of Senators by the House of Representatives, 227.
- favored a small Senate, 229.
- favored seven-year term for Senators, 230.
- opposed fixing a day for Congress to convene, 277.
- on attendance of members, 280.
- favored a Council of Revision, 356, 357.
- advised Washington concerning his first veto, 373.
- on the powers of Congress, 381.
- moved to authorize President to veto resolves, 378.
- opposed issuing paper money, 411, 413.
- on police power of the States, 597.
- on a national judiciary, 667.
- on the power to declare war, 676.
- speech on titles of nobility by, 759.
- called President "National Executive" in his plan for a Constitution, 850.
- favored election of President by Congress, 876.
- on succession to the Presidency, 892, 901.
- favored impeachments, 1029.
- first Attorney General of the United States, 1055 n.
- proposed bill requiring seriatim opinions by judges, 1062, 1063 n.
- opposed increasing compensation of judges, 1078, 1079.
- on full faith and credit clause, 1194.
- proposed treason clause, 1223 n.
- on provision for new States, 1246, 1247.
- author of expression "guarantee of a republican form of government," in the Constitution, 1283, 1284.
- on provision for oaths, 1332.
- on ratification, 1340.
- text of his plan of a Constitution, 1699.

RANDOLPH, JOHN—

- opposed the construction of the mint, 637.

RANDOLPH, PEYTON—

- first president of first Colonial Congress, 1, 206.

RANNEY, JUDGE—

- on delegation of power, 118.

References are to pages.

RANSOM, MATTHEW W.—

appointment of, as minister to Mexico, 336.

RATES (see RAILWAY RATES).

RATIFICATION OF CONSTITUTION—

by nine States required, 1340-1342.

RATIFICATION OF TREATIES—

by concurrence of the Senate, 952.

RAVARA—

asserted his privilege as a foreign consul, 320.

RAWLE—

on instruction of delegates to Constitutional Convention, 163.

on Congressmen holding other offices, 339.

on removal of Congress to Princeton, 698.

on impeachability of Congressmen, 1031, 1032.

on the Third Amendment, 1413.

READ, GEORGE—

member of first Colonial Congress, 2.

opposed Declaration of Independence, 18.

delegate to Constitutional Convention, 58.

member of first Senate, 225.

avored governor appointing Senators, 227.

resigned as Senator, 245.

author of phrase, "other direct tax," 747.

voted against Senate passing on removals from office, 978 n.

signed the Constitution, 1347, 1770.

READ, JUDGE—

on cruel punishments, 1519.

REAL ESTATE (see PROPERTY AND TAXES)—

taxes on, 186-190.

RECALL OF VETO—

no power to, 375.

RECESS OF SENATE—

Knox on, 991.

defined by Senate, 992, 995.

RECOGNITION OF MEMBERS BY SPEAKER OF HOUSE—

Justice Miller on, 204.

RECONSTRUCTION COMMITTEE OF CONGRESS—

after Civil War, 1597, 1598.

References are to pages.

RECORDS OF STATES—

credit attached to in other States, 1197-1204.
Congressional regulation of proof of, 1199, 1200.

REDEUNDO—

privilege of, 311.

REDFIELD, CHIEF JUSTICE—

on police power, 600.

REED, THOMAS B.—

Speaker of the House of Representatives, 206.

REGULATION OF COMMERCE—

with foreign nations, among the States and with the Indians, considered, 453-535.

RELIGION—

definition of, 1387.
not a defense for polygamy, 1386.
meaning of "establishment" of, 1376 n.

RELIGIOUS FREEDOM (see CHURCH AND STATE),

in State Constitutions, 1397, 1398.

RELIGIOUS TESTS—

Pinckney on, 1338 n.
Taney, Chief Justice, on, 1339.

REMOVALS FROM OFFICE—

in case of impeachment, 266.
Senate originally claimed power to pass on, 976, 978.
Calhoun on, 982.
Justices Thompson and Lamar on, 983.
by President Cleveland, 983.
Peckham, Justice, on, 984.
by President McKinley, 985.
Madison on, 1036.

REPRESENTATIVE GOVERNMENT—

Wise on destruction of, 1653.

REPRESENTATIVES IN CONGRESS—

qualifications of, 141-161.
State cannot add qualifications for, 157.
how apportioned, 169.
not subject to impeachment, 208.
election of, 270-274.
expulsion of, 284.
compensation of, 301, 305.
ineligible to other offices, 330-341.

References are to pages.

REPRESENTATIVES IN CONGRESS (continued)—

- when privileged from arrest, 306-310.
- freedom of speech in Congress guaranteed, 322.
- four States demanded an amendment prohibiting increase in pay of, till after next election of, 1667.

REPRESENTATIVES, HOUSE OF—

- when term first used, 125.
- members of, 126, 130.
- definition of, 125.
- name adopted late in Constitutional Convention, 125.
- name suggested by Rutledge as chairman of Committee of Detail, 125.
- biennial election of established, 126, 130.
- annual elections to Congress under Articles of Confederation, 126.
- mode of election to, debated, 130, 140.
- qualifications of electors for, 130, 133.
- Hamilton and Tucker on qualifications of electors for, 137, 138.
- qualifications of members of, 141-161.
- age, citizenship and residence of members of, 141.
- age of members of, suggested by Mason, 143.
- qualifications of delegates in, 154.
- residence in State a necessary qualification for member of, 155, 156.
- meaning of "inhabitant," 156.
- "State" defined in relation to, 157.
- State cannot add qualifications for member of, 157.
- letter of Jefferson on State adding qualifications for member of, 158, 160.
- apportionment of Representatives, 162, 170, 171.
- Representatives and direct taxes, 170-174.
- debate on Representatives and direct taxes in Convention, 170-173.
- vacancies in, how filled, 190-202.
- to choose Speaker and other officers, 202.
- power of Speaker of, 204.
- list of Speakers of, 204-206.
- has sole power of impeachment, 207.
- procedure in impeachment by, 209-211.
- managers for, in impeachment trial, how chosen, 211.
- on place and manner of election of members of, 270-278.
- Congress to control elections for, 274.
- elections for, held in November, except in Maine and Oregon, 278.
- judge of qualifications of its own members, 280, 284.
- power of, concerning rules, punishment and expulsion of members, 284, 288, 293.
- Randall on rules of, 285.
- journal of, 293.

*References are to pages.***REPRESENTATIVES, HOUSE OF (continued)—**

- vote required for yeas and nays in, 294.
- journal of, a public record, 296.
- signing of bills by speaker of, 297.
- adjournment of, 298.
- members of Congress paid by States under Articles of Confederation, 301.
- increased compensation of members of, 302, 303 n.
- privilege of members of, from arrest, 306-319.
- privilege of members of Congress under Articles of Confederation, 325.
- revenue bills must originate in, 342-352.
- bills originating in when returned to, by President, 353, 380.
- members of cannot be electors for President, 887.
- relation of, to treaties, 957.
- right of, to demand papers relating to treaties, 958-966.
- claims right to be recognized in treaty-making power, 961, 962.
- views of Blaine on treaty-making power of, 962.
- views of Jefferson on treaty-making power of, 963.
- views of Justice McLean on treaty-making power of, 964.
- members of, must take an oath, 1332.
- form of oath of members of, 1335 n.
- presence of members of, at electoral count required, 1571 n.
- when President elected by, 1559, 1570.
- provision for election of President by, suggested by Sherman, 1559.

REPRIEVES AND PARDONS—

- by the President, 935-946.
- definition of, 937.

REPRISAL (see LETTERS OF MARQUE).**REPUBLICAN FORM OF GOVERNMENT—**

- guaranteed, 1282-1292.
- clause attributed to Wilson, 1282.
- no guarantee of in Articles of Confederation, 1282.
- debate on in Constitutional Convention, 1283-1286.
- Madison on benefits of, 1286.
- Taney, Chief Justice, on, 1287-1289.
- Chase and Wilson on, 1288.
- Webster and Calhoun on, 1290, 1291.
- Reverdy Johnson and Cooley on, 1291, 1292.

REPUBLICANS—

- who were, 94 n.

RESIDENCE—

- of Representatives, 155-157.
- residence and citizenship, 1118.

References are to pages.

RESOLVES (see **JOINT RESOLVES**).

RESTRAINT OF TRADE (see **TRUSTS**), 581.

RETURNS BY STATE OFFICIALS OF CONGRESSMEN ELECTED—
prima facie evidence of election, 282.

RETURN OF BILLS—
by President to Congress, 364.

REVENUE BILLS—
must originate in House of Representatives, 342.
Senate can alter or amend, 342.
Randolph on, 345.
Madison on, 346.
defined by courts, 351.
in House of Commons, 342.
clause concerning, reported by Brearley, Chairman of Committee
of Eleven, 349.

REVENUE STAMPS—
constitutionality of law concerning, sustained, 389.

REVISION OF LAWS—
council for, provided in Randolph's plan, 1171.
provision for Council for, defeated in Convention, 1171, 1174.
Chancellor Kent on Council for, 1172 n.

REVOLUTION OF 1688—
ended veto power in England, 355.

RHODE ISLAND—
sent delegates to first Colonial Congress, 1.
signed Articles of Confederation, 25, 1697.
refused to send delegates to Constitutional Convention, 46, 64.
not represented in first Senate, 225.
imprisonment for debt in, 825.
last State to ratify the Constitution, 1311, 1346.
ratified first amendments, 1368.

RHODES, SAMUEL—
member of first Colonial Congress, 2.

RICHARDSON, CHIEF JUSTICE—
on attendance of witnesses in Congressional hearings, 288.

RIGHT OF PETITION (see **FIRST AMENDMENT**), 1371-1375.

RIGHTS NOT ENUMERATED—
retained by the people, 1523.
Paschal, Story and Madison on, 1523, 1524.
what rights can be protected by Congress, 1662.

References are to pages.

RIGHT TO VOTE—

guaranteed by the Fifteenth Amendment, 1667-1674.

RIPARIAN RIGHTS—

discussed, 1465-1467.

RIVERS AND HARBORS—

power of Congress to improve, 648.

ROANE, JUDGE—

on seriatim opinions of judges, 1062, 1063 n.

ROBERDEAU, DANIEL—

signed Articles of Confederation, 1698.

RODNEY, CAESAR—

delegate to first Colonial Congress, 2.

signed Declaration of Independence, 26.

ROGERS, ANDREW—

member of Reconstruction Committee, 1598.

ROLL CALL—

resorted to, to ascertain quorum, 283.

ROMAN LAW—

public and private rights under, 144.

veto power under, 355.

bankruptcy under, 625.

cruel punishment under, 1442.

compensation for private property under, 1458.

ROMAN EMPERORS, 1734.

ROOSEVELT, THEODORE—

on the Vice-Presidency, 253.

vetoes by, as President, 376.

declined to send papers to Senate, 966.

on the decline of the electoral college, 1573.

action of, as President in Nevada insurrection, 1296, 1301.

order of, as President dismissing colored troops from army, 917.

ROSE, U. M.—

on the power to summon the President, 1013 n.

ROUSSEAU—

influence of, on the framers of the Constitution, 78.

ROTATION OF SENATORS—

how determined, 242.

References are to pages.

RULES—

- of the House of Representatives, 203, 204, 283-294.
- of the Senate, 283-294.
- procedure under, 285.
- contempt under, 283.
- expulsion under, 288-292.

RUSH, BENJAMIN—

- member of first Colonial Congress, 1, 8.
- signed Declaration of Independence, 26.

RUTLEDGE, EDWARD—

- member of first Colonial Congress, 2.
- member of Committee on the Articles of Confederation, 23.
- signed the Declaration of Independence, 26.

RUTLEDGE, JOHN—

- member of first Colonial Congress, 2.
- member of Committee on address to the King, 9.
- delegate to Constitutional Convention, 62.
- member of Committee of Eleven, 76, 233.
- chairman of Committee of Detail, 76.
- reported term, "House of Representatives," 125.
- author of two-year term for Representatives, 126.
- opposed limited suffrage, 137.
- on habeas corpus, 723.
- member of Committee of Judiciary in Colonial Congress, 1040 n.
- member of Committee on Captures, 1043 n.
- appointed to Supreme Court by Washington, 1055 n.
- reported "full faith and credit clause," 1195.
- on amending the Constitution, 1303.
- signed Constitution, 1349, 1771.
- reported Constitution to Convention, 1774.

S.

SAILORS—

- contracts with, for services not involuntary servitude, 1588.

SALARIES—

- of Senators and Representatives, 301, 302 n, 303 n, 304 n. 305 n.
- of Vice-President, 305.
- of President, 902, 907.

SALARY, TAX ON—

- letter of Chief Justice Taney concerning, 196-198.

SANBORN, JUDGE—

- on President's power to pardon for contempt, 943-945.

References are to pages.

- SANDFORD, JUDGE—
on citizenship, 150.
- SAN FRANCISCO—
laundry ordinance of, and Fourteenth Amendment, 1648.
- SAXON LAW—
trials by compurgation under, 1135.
jury trials under, 1141, 1497.
- SCHOFIELD, JUDGE—
on presence of defendant at trial, 1454.
- SCHUYLER, PHILIP—
member of first Senate, 225.
- SCUDDER, N.—
signed Articles of Confederation, 1698.
- SCROGGS—
Star Chamber judge, 1076, 1421.
- SEARCH WARRANTS—
to be issued on oath or affirmation, 1415-1418.
- SEAT OF GOVERNMENT—
location and control of, 695-698.
- SEBASTIAN, W. K.—
expelled from Senate, 289.
- SECOND AMENDMENT—
protects the people in their right to bear arms, 1408-1410.
meaning of "arms" under the, 1410, 1411.
- SECRET JOURNALS OF CONGRESS—
keeping of, discretionary with each House, 295.
- SECRET SESSION OF EACH BRANCH OF CONGRESS—
may be held at discretion of each House, 291, 292.
- SECRETARIES OF DEPARTMENTS (see CABINET).
- SECRETARY OF AGRICULTURE—
cannot make regulations concerning State commerce, 550.
- SECRETARY OF THE TREASURY—
his independence of the President, 925 n.
- SECTATORES OR JURORS—
system established by the Saxons, 1497.

References are to pages.

SEDGWICK, THEODORE—

Speaker of the House of Representatives, 204.
on First Amendment, 1374.
proposed Eleventh Amendment, 1539.

SEDITION LAWS—

effect of, 1177.

SENATE OF THE UNITED STATES—

purpose in establishing, 224.
definition of, 225.
term "Senate," when first used, 225.
powers of, how divided, 226.
Senate and President, 227.
method of election to, 227.
number of Senators from each State, 229, 232.
tenure of Senators, 230.
John Adams on, 227 n, 231 n.
instruction of Senators by States, 234, 235.
Madison and Washington opposed instructions to members of, 236 n.
qualifications of members of, 246, 249.
age of members of, 246.
citizenship of members of, 248.
residence of members of, 249.
officers of, 255.
power of, to try impeachments, 256, 262.
election of members of, 270-274.
expulsion of members of, 288.
compensation of members of, 301-305.
members of, when privileged from arrest, 306, 331.
freedom of debate in, 322.
members of, ineligible to hold other offices, 330, 341.
cannot originate revenue bills, 342-349.
effort in Convention to vest war powers in, 677.
members of, ineligible as presidential electors, 887.
treaty powers of, 948, 950.
not bound to concur in a treaty, 952.
right of, to demand papers of President, 966.
power of, in appointment of officers, 967-972.
power of, in removal from office by President, considered, 976-981.
when President can fill vacancies without concurrence of, 988-998.
recess of, 992, 995.
recess vacancies of, 994, 995.
definition of recess, 995-999.
can be convened by President, 1001.
equal vote in, guaranteed to States, 1307.

References are to pages.

SENATE OF THE UNITED STATES (continued)—

members of must be present at counting of electoral vote, 1571.
when the Vice-President is elected by the, 1564.

SENATORS—

election contests of, 237-241.

SERGEANT—

member of Standing Committee on Appeals, 1048.

SERIATIM OPINIONS IN SUPREME COURT—

urged by Jefferson and Madison, 1061, 1063 n.
originated with Lord Mansfield, 1062.
Randolph's bill for, 1063 n.

SERVITUDE AND PEONAGE—

forbidden, 1586-1588.

SESSIONS OF CONGRESS—

begin annually in December, 275.

SEVENTH AMENDMENT—

preserves jury trials in common law suits when amount involved exceeds twenty dollars, 1490.
applies to the Territories, 1494.
what is a suit at "common law," 1495.
why amount fixed at twenty dollars, 1491-1497.
re-examination of facts under, must be by rules of common law, 1499-1501.

SEWALL, JUDGE—

on aliens, 150.

SEWARD, WILLIAM H.—

on President as commander in chief, 917.

SHAUCK, JUDGE—

on veto by Governor, 364.

SHAW, CHIEF JUSTICE—

on police power, 599.

SHELLABARGER, SAMUEL—

on Fifteenth Amendment, 1569.

SHERMAN, JOHN—

on legal tender cases, 444 n.
author of anti-trust bill, 582.

SHERMAN, ROGER—

member of first Colonial Congress, 1.
member of Committee on Independence, 13 n.

*References are to pages.***SHERMAN, ROGER (continued)—**

- member of Committee on the Articles of Confederation, 23, 1047 n.
- delegate to Constitutional Convention, 58.
- avored annual elections for Representatives, 128.
- avored electing Representatives by State legislatures, 130.
- avored five-year term for Senators, 230.
- avored each State having one vote in Senate, 232.
- avored annual meeting of Congress, 276.
- avored money bills originating in the Senate, 344.
- opposed the veto power, 358.
- reported "uniform duty clause," 383.
- opposed preference being given to ports, 751.
- opposed paper money, 764.
- on bills of credit and ex post facto laws, 778, 833.
- member of committee on title for President, 852 n.
- on electors, 876, 883.
- on tenure of Supreme Court justices, 1070.
- opposed surrender of slaves, 1242.
- on amendments to the Constitution, 1304, 1307.
- member of Grand Committee on State Debts, 1323.
- signed Constitution, 1346, 1770.
- avored adding amendments to the Constitution and not including them in it, 1365-1367.
- member of committee on amendments, 1365 n.
- opposed clause in first amendment relating to religion, 1372.

SHIPPEN, JUDGE—

- on privilege of Representatives, 321.

SHIPPING—

- debate on, in Constitutional Convention, 464-466.

SHIPS OF WAR—

- States not to maintain in times of peace, 843, 845, 849 n.

SHIRAS, JUSTICE—

- on commerce powers, 454.
- on interstate commerce act, 538.
- on long and short haul, 552.
- on Constitutional Amendments, 1547.

SIMONTON, JUDGE—

- on original packages, 516.

SIXTH AMENDMENT—

- secures a speedy and public trial in criminal cases, 14.3.
- what is a speedy trial under the, 1475.

*References are to pages.***SIXTH AMENDMENT (continued)—**

- what is a public trial under the, 1476.
- trial must be by an impartial jury, 1477.
- the jury must consist of twelve men, 1479.
- the accused shall be informed of the accusation against him, 1481.
- the accused shall be confronted with the witnesses against him, 1483-1485.
- the accused shall have compulsory process for obtaining his witnesses, 1485, 1486.
- the accused shall have the assistance of counsel for his defense, 1486.

SLAVE—

- term not found in the Constitution, 716.

SLAVE TRADE—

- attitude of Colonial Congress on, 712.
- could not be prohibited by Congress till after 1808, 715.
- Madison on nature of the clause, 715-717.
- omission of the word "slave" from the Constitution, 716.
- migration and importation of persons, 715, 716.
- Pinckney's speech on, in House of Representatives, 717-720.
- opinions of Miller and Woodbury, Justices, on, 720, 721.

SLAVERY—

- cause of South opposing bill of rights, 1353 n.
- forbidden by Thirteenth Amendment, 1582-1592.
- abolition of, based on Ordinance of 1787, 1583.
- Adams on power of President to abolish, 913 n.
- abolished under war power of President, 913 n.

SMALLEY, JUDGE—

- on suspension of the writ of habeas corpus, 725.

SMITH, MERIWETHER—

- delegate to the Annapolis Conference, 39.

SMITH, S.—

- suggested election of President by House of Representatives from three highest candidates, 1566.

SMITH, RICHARD—

- member of the first Colonial Congress, 2, 894.

SMITH, JONATHAN BAYARD—

- signed the Articles of Confederation, 1698.

SOCIALISTS—

- naturalization of, refused, 619.

References are to pages.

SOCRATES, 1470 n.

SOLDIERS—

quartering of, in houses without owner's consent, when forbidden, 1412.

SOMERS, LORD, 219.

SOMERSET, DUKE OF, 218.

SOUTH CAROLINA—

delegates from, in first Colonial Congress, 2.

instructed delegates to first Colonial Congress, 4.

signed the Articles of Confederation, 25, 1698.

delegates from, to Constitutional Convention, 62, 63.

members of first Senate from, 225 n.

on impeachment, 258.

governor of, called "President," 851.

governor of, commander in chief of State troops, 912.

ceded lands to United States, 1258.

ratified the Constitution, 1345.

opposed a bill of rights, 1353 n.

proposed four amendments to Constitution, 1363.

ratified the early amendments, 1368.

laws of, on religious freedom, 1397 n.

SOUTHAMPTON, EARL OF, 219.

SPAIGHT, RICHARD D.—

delegate to Constitutional Convention, 61.

avored seven-year term for Senators, 236.

member of committee on commerce, 457.

signed Constitution, 1348, 1771.

SPARTA—

its dual executive cited by Calhoun as model for Presidency, 858 n.

SPEAKER OF THE HOUSE OF REPRESENTATIVES—

only officer of the House provided for in the Constitution, 202, 203.

title taken from the House of Commons, 203.

called "President" in Colonial Congress, 203.

how chosen, 203.

Justice Miller's views on, 204.

Speakers of House of Representatives, 204–206.

signs bills passed by House, 297, 298.

administers oaths to Representatives, 334.

SPEAR, JUDGE—

on enforcement of the Thirteenth Amendment, 1589.

References are to pages.

SPEEDY TRIAL—

guaranteed, 1472, 1489.
definition of, 1475.

SPENCER, JUDGE—

on disfranchisement, 1518.

SPOILS SYSTEM—

Calhoun on the, 980.

STAFFORD, EARL OF, 222, 223.

ST. CLAIR, ARTHUR—

President of the second Colonial Congress, 207.
disregarded treaties by States, 1329.

STANBERY, HENRY, ATTORNEY GENERAL—

on vacancies in recess of the Senate, 989.
on Jefferson and the trial of Aaron Burr, 1017.

STANDARD WEIGHTS AND MEASURES—

power of Congress to establish, 634, 639.

STANDING ARMIES—

authority to raise and support, 684-689.

STATES, ORIGINAL—

which proposed amendments to the Constitution, 1363.

STATES OF THE UNION—

Colonies became States on the adoption of the Declaration of Independence, 19, 20 n.

the style of the Confederacy was, "The United States of America," 27.

the Articles of Confederation came from the, not from the people, 30.

appointed delegates to Annapolis, 42.

appointed and instructed their delegates to the Constitutional Convention, 46, 48.

definition of term "State," 157.

cannot add qualifications for Senators or Representatives, 157.

State legislatures elect Senators, 224.

each State entitled to two Senators, 230.

no authority for State legislatures instructing members of Congress, 234-236.

surrendered their power over interstate commerce to Congress on the adoption of the Constitution, 483, 484.

cannot prevent interstate companies from doing business therein, 505, 543.

may regulate the delivery of interstate messages, 506.

References are to pages.

STATES OF THE UNION (continued)—

- State authority complete in the, 522.
- regulation of manufactories by, 523.
- regulation of labor by, 533.
- cannot discriminate against foreign products, 547.
- when may regulate railroad charges, 551.
- may tax their own commerce, 551.
- may regulate the speed of trains, 552.
- may regulate stopping of trains at stations, 554, 555.
- may regulate the running of Sunday trains, 560-563.
- may pass inspection laws, 565.
- cannot exclude foreign articles because not inspected in the State, 566, 567.
- can enact quarantine laws, 568.
- cannot burden or impair interstate commerce, 569.
- may create commissions to inspect products, 570.
- police powers of, examples under, 601, 602.
- right of, to regulate internal affairs not surrendered to Congress, 602.
- can only confer citizenship within their limits, 620.
- may regulate weights and measures until Congress acts thereon, 640.
- may regulate transfer of patent rights, 663.
- when may use their military power, 693.
- drilling of military bodies in, subject to control of, 694.
- cannot enter into a treaty, alliance or confederation, 763, 764.
- cannot grant letters of marque and reprisal, or coin money, 764.
- cannot emit bills of credit, 764, 774.
- cannot make anything but gold and silver coin a tender, 764.
- cannot pass bills of attainder or ex post facto laws, 763.
- cannot grant titles of nobility, 763.
- cannot pass a law impairing the obligation of contracts, 774.
- borrowing power of the, 773.
- may impose conditions upon foreign corporations doing business in, 817, 819.
- contracts valid when made cannot be impaired by, 827.
- cannot lay imposts or duties on imports or exports without consent of Congress, 837, 838.
- cannot lay duties of tonnage without consent of Congress, 842, 843.
- cannot keep troops or ships of war in times of peace, 844.
- cannot enter into any agreement with other States, 845.
- cannot engage in war unless invaded or in time of danger, 848.
- full faith and credit between, 1193, 1204.
- must grant privileges to citizens of other States, 1205, 1221.
- must surrender fugitives from justice, 1222, 1224.

References are to pages.

STATES OF THE UNION (continued)—

- treason against, 1224-1231.
- persons held to service or labor in escaping to shall be delivered up by, 1242.
- admission of new States to the Union, 1245, 1249.
- when State may be erected within another State, 1245, 1249.
- how a State may be formed by junction with another State, 1245-1249.
- where sovereignty of the State resides, 1250.
- a State admitted to the Union is on equality with other States, 1250.
- property of a territory when admitted as a State belongs to the State, 1250.
- republican form of government guaranteed to, by United States, 1282, 1288.
- Congress determines when a State has a republican form of government, 1288.
- the United States protects a State against invasion, 1282, 1293.
- when a State is protected against domestic violence, 1294, 1301.
- shall not be deprived of equal vote in Senate, 1307.
- Constitution ratified by the, 1340-1346.
- which proposed amendments to the Constitution, 1363.
- ratified early amendments, 1368.
- suits against, 1535-1542.
- power of Congress to reduce representation of, 1650-1653.
- power to reduce representation of, has never been exercised by Congress, 1653.
- when Congress may exercise such power, 1659, 1662.
- defeat of the Corwin amendment by the, 1679.

STATUTORY LAW—

- derived from Constitutions, 107.

STEVENS, C. E.—

- on development of the Senate, 231.
- on electors, 886, 1563.
- on President and cabinet, 920 n-931.

STEVENS, THADDEUS—

- member of Reconstruction Committee, 1597, 1598.
- presented resolution embodying the Fourteenth Amendment, 1598.
- Thorpe's Eulogy on, 1665 n.

STEVENSON, ANDREW—

- Speaker of the House of Representatives, 205.

References are to pages.

STEWART, WILLIAM M.—

on the veto power, 374.

on the Fifteenth Amendment, 1669, 1671.

STILES, EZRA—

on the power of the President, 856 n.

on Constitutional Convention, 1348-1350 n.

STOKES, ———

on the Fifteenth Amendment, 1668.

STONE, THOMAS—

member of Committee on Articles of Confederation, 23, 1047 n.

STORY, JUSTICE—

on first Colonial Congress, 12.

on weakness of Articles of Confederation, 36, 37.

on the Preamble, 89, 92, 97.

on taxes, 188.

on impeachment, 209, 1032.

on Vice-President and President of the Senate, 252, 255.

on breach of the peace, 310.

on abuse of Congressional privilege, 329.

taxes and duties defined by, 386, 387.

on the power to tax, 397.

on uniformity of taxation, 406, 407.

on the power of Congress over post roads, 643.

on piracy, 671.

on succession to the Presidency, 900.

on privileges of ministers, 1101.

on the guarantee of a republican form of government, 1286.

on treaties as the supreme law of the land, 1331.

on church and state, 1380.

on election of the President, 1380.

on immunity of President from legal process, 1020, 1023.

on the duty of Congress to establish federal courts, 1068.

on appellate jurisdiction of Supreme Court, 1128, 1131.

on the power of courts to annul laws, 1183.

on treason against a State, 1225.

on admission of Texas into the Union, 1253-1255.

on the common law, 1494.

on the implied powers of Congress, 1660.

STREET RAILWAY CHARTERS, 821.

STREETS—

classification of property on for taxation, 1647.

STRODE, RICHARD, 323, 324.

References are to pages.

STRONG, CALEB—

- delegate to Constitutional Convention, 60, 61.
- failed to sign the Constitution, 65.
- member of the first Senate, 225.
- offered compromise on revenue bills, 349.
- opposed Senate passing on removals from office, 978.

STRONG, JUSTICE—

- on taxes, 389.
- on legal tender, 437, 442, 444, 445 n.
- on health laws, 604.
- on impairment of obligation of contracts, 774, 831.
- on confiscation act of Civil War, 1158, 1164-1166.
- on Congress and State laws, 1664.

STYLE OF TITLE FOR "PRESIDENT"—

- debate on the, 851-853 n.

SUCCESSION TO THE PRESIDENCY—

- in case of impeachment, 218.
- considered and discussed, 891, 902.
- relation of President of Senate and Speaker of House of Representatives to the, 896.
- Act of 1886 relative to, 896, 897.
- Tucker and Black on, 898.
- Curtis on, 900.

SUCCESSION TAX—

- Clifford, Justice, on, 186.

SUFFRAGE—

- discussed in Constitutional Convention, 134, 141.

SUGAR REFINING—

- federal control of, 525.
- United States v. Knight Co., 583.

SUITS AGAINST STATES—

- when forbidden, 1535, 1552.
- Hamilton on, 1536.
- debate in Virginia Convention on, 1536.
- Madison and Marshall on, 1537.
- Sedgwick and Gallatin proposed the Eleventh Amendment to prevent, 1539.
- Miller, Justice, on suing a sovereign power, 1540.
- Gray and Bradley, Justices, on, 1540, 1541.
- Marshall, Chief Justice, on Eleventh Amendment, 1540, 1543.
- when is a State a party to a suit, 1543, 1544.

References are to pages.

SUITS AGAINST STATES (continued)—

Marshall, Swayne and Matthews on, 1544.
Harlan on suits against State officers, 1545.
what are not suits against a State, 1547.
Trickett on, 1549.

SULLIVAN, JOHN—

member of the first Colonial Congress, 1.
on equality of State suffrage, 6.

SUMMONS—

privilege of Congressmen against, 314.
privilege of ambassadors against, 319.
privilege of President against, 1012-1017.

SUMNER, CHARLES—

on impeachment of President Johnson, 208, 220, 221.
proposed constitutional amendment, 1583.
on equal protection of the laws, 1630.
introduced bill to abolish the electoral college, 1579 n.

SUNDAYS—

excepted from time allowed for signing bills by President, 353, 368.

SUPERIOR COURT—

under Articles of Confederation, 1048.

SUPREME COURT—

members of appointed by President, 967, 972.
established by Constitution, 1050.
Van Buren on powers of, 1051 n.
name suggested by Charles Pinckney, 1052.
Congress cannot abolish the, 1053.
opinions on power of, 1053 n.
creation and oath of members of the, 1054.
Jefferson and Madison favor seriatim opinions by members of,
1061 n, 1063.
jurisdiction of, limited only by national boundary, 1066, 1067.
tenure of term of members of, 1069.
compensation of members of, 1079.
no qualifications prescribed for by Constitution, 1167.
jurisdiction of discussed, 1081, 1083.
original jurisdiction of, 1122, 1127.
appellate jurisdiction of, 1127.
power of, to annul laws, 1192.
Marshall changes his views on power of, to annul laws, 1175, 1180-
1182, 1184 n.
power of, to annul laws rarely exercised, 1192.

References are to pages.

SUPREME LAW OF THE LAND—

consists of the Constitution, acts of Congress and treaties made in pursuance thereof, 1325, 1329.

SURRENDER OF FUGITIVES—

discussed, 1222-1244.

SUSPENSION OF WRIT OF HABEAS CORPUS—

considered, 721-735.

SUSPICIOUS PERSONS—

arrest of, 1427.

SWAYNE, JUDGE—

impeachment of, 211, 220, 264, 265.

SWAYNE, JUSTICE—

on natural born citizens, 150.
on direct taxes, 183.
on duties and taxes, 388.
on grant of power, 490, 491.
on obligation, 788, 789.
on parties to a suit, 1544.
on a Bill of Rights, 1551.
on slavery and the Thirteenth Amendment, 1585.

SWEEPING CLAUSE OF THE CONSTITUTION—

considered, 711, 714.

SWORD AND PURSE—

Justice Bradley on, 1443.

T.

TACITUS—

on taking private property for public use, 1458.

TAFT, WILLIAM H.—

on proclamations of amnesty, 947 n.

"TAKEN"—

meaning of, in Fifth Amendment, 1464.

TALENT—

decline of in second Colonial Congress, 26 n.

TALLIAGE, 386.

TANEY, CHIEF JUSTICE—

on "people" and "citizens," 132.
protested against tax on salary of judges, 196-198.
on commerce power of Congress, 489, 490.

References are to pages.

TANEY, CHIEF JUSTICE (continued)—

- on State citizenship, 621.
- on necessary and proper power, 708.
- on suspension of writ of habeas corpus, 724.
- on compacts, 845.
- on vacancies in Senate recess, 958.
- on independence of Supreme Court, 1053 n.
- on law and equity, 1090.
- on power of courts to annul laws, 1185, 1187.
- on the Constitution and Colonial government, 1273-1275.
- on religious tests, 1339.
- on rights of States under the Tenth Amendment, 1528.
- on rights of citizenship, 1606.

TAXATION—

- for purposes of revenue, 350.

TAXES, DIRECT—

- debate on in Constitutional Convention, 170, 198.
- for purposes of revenue, 350.
- power to lay and collect, 382-405.
- by States under Articles of Confederation, 385.
- defined by Story, 386, 397.
- Tucker on, 387.
- Chase, Justice, on, 388.
- Jefferson on, 390.
- Hamilton on, 391.
- Fuller, Chief Justice, on, 404.
- White, Justice, on, 405.
- limits of the power of Congress to levy, 398, 404.
- taxes on railroads, 551.
- poll taxes, 747.
- taxes on exports from States prohibited, 749.
- taxes and due process of law, 1452.
- classification of taxes, 1640, 1642.
- inheritance taxes, 1642.
- special taxes, 1645-1647.

TAYLOR, HANNIS—

- on Pelatiah Webster, 81 n.
- on interstate citizenship, 1211 n.
- on the Fourteenth Amendment, 1610 n.

TAYLOR, JOHN W.—

- Speaker of the House of Representatives, 205.

References are to pages.

TAYLOR, ZACHARY—

vetoed no bills as President, 376.
absences from capital while President, 1011.

TAYLOR, GEORGE—

member of second Colonial Congress, 18.

TAZEWELL, HENRY—

letter from Jefferson to, 266 n.

TELEGRAPH, THE—

as an instrument of interstate commerce, 497, 506.

TELEPHONES—

as instruments of interstate commerce, 509-511.

TELFAIR, EDWARD—

signed Articles of Confederation, 1698.

TELLER, WILLIAM H.—

on impeachment trial of Judge Swayne, 204.

TEN-DAY CLAUSE IN CONSTITUTION—

concerning return of bills to Congress by the President, 353, 365,
368.

TENTH AMENDMENT—

designates the line between the States and general government, 1524,
1525.

Tucker's proposed amendment to the, 1525.

Marshall, Chief Justice, on the, 1526.

Andrews on the, 1527.

Taney, Chief Justice, on the, 1528.

Chase, Chief Justice, on the, 1528.

Nelson, Justice, on the, 1528, 1529.

Brewer, Justice, on the, 1529, 1530.

Jefferson's letter on the, 1530 n.

first ten amendments are limitations on the federal government,
1530-1535.

Bryce on omission of original amendments from the Constitution,
1533 n.

TENURE OF FEDERAL JUDGES—

continues during good behavior, 1069.

TERM OF SENATORS—

duration of, 230.

References are to pages.

TERRITORIES—

courts in not federal courts, 1066.
 how they become States, 1245-1253, 1264.
 when admitted to the Union property of, accrues to State, 1250.
 power of Congress over, 1255-1260.
 rights of inhabitants of, 1261.
 form of government of, 1262.
 jury trials in, 1494.

TERRITORY, NEWLY ACQUIRED—

when Congress can legislate for, 1279.
 Constitution applies to, which is incorporated in the United States, 1279.
 Constitution not applicable to, not incorporated in the Union, 1279.
 the Bill of Rights applies to, which is part of the United States, 1279.
 when the government of the United States extends to, 1279-1281.
 may be controlled by the President under his military power, 1280.
 United States can hold until inhabitants of, are qualified for citizenship, 1281.
 Congress can determine the time, can be held until admitted into the Union, 1281.

TEXAS—

citizens of, naturalized by annexation, 153, 154, 618.
 admitted to Union by resolution of Congress, 1253, 1255.
 Story and Gallatin on, 1253, 1255.

THAYER, JUDGE—

on trusts, 578.

THAYER, JAMES B.—

on the power to subpoena the President, 1013.

THIRD AMENDMENT—

regulates the quartering of soldiers in private houses in peace and war, 1412, 1413.

THIRTEENTH AMENDMENT—

history of the, 1582-1584.
 Swayne, Justice, on the, 1585, 1586.
 abolished slavery in United States, 1586.
 involuntary servitude, meaning of, 1588, 1589.
 how Congress can enforce the, 1589.
 denial of equal admission of persons to public places not a violation of the, 1590-1593.

THOMPSON, CHARLES—

Secretary of first Colonial Congress, 1, 2.

References are to pages.

THOMPSON, JUSTICE—

- on Charles River Bridge Case, 811.
- on heads of departments, 974.
- on inferior courts, 983.
- on the power of the President, 1019.

THORNTON, MATTHEW—

- member of first Colonial Congress, 18.

THORPE, FRANCIS N.—

- on Madison's rejected amendment to Preamble, 106.
- on oaths of officers, 1332.
- on passage of first ten amendments, 1365 n, 1369 n, 1372, 1374, 1491, 1524.
- on the Eleventh Amendment, 1539.
- on the Fourteenth Amendment, 1665, 1666.
- on the Fifteenth Amendment, 1669, 1671.
- eulogy on Thaddeus Stevens, 1666 n.

THURMAN, JUDGE—

- on journals of House of Representatives as evidence, 296.

TIBERIUS—

- on compensation for private property taken for public use, 1458.

TILDEN, SAMUEL J.—

- Presidential contest of, 1570.

TILGHMAN, JUDGE—

- on fugitives from justice, 1241.

TITLES OF NOBILITY—

- not to be granted by the United States, 757-759.
- not to be granted by any State, 804.

TODD, JUDGE—

- impeachment of, 1170.

TOLL ROADS—

- can exact toll from mail carriers, 652.

TOMLIN—

- defines duties, 388.

TONNAGE—

- allowed to States for lighthouses and harbors, 834-837.
- definition of, 843.

TOWLE—

- on instructions to delegates to Constitutional Convention, 48.
- on desire of Otis for a Congress, 121.

References are to pages.

TRADE—

desire that it be under Congressional control, 38.
 of Colonies and States, 38, 44, 454.
 interest in, led to Annapolis Convention, 40.
 trade and commerce synonymous terms, 455.
 the term "commerce" retained in the Constitution instead of
 "trade," 460.
 use of term "commerce" criticized by Professor Bigelow, 461 n.
 trade and commerce defined, 455, 460, 470.
 under Articles of Confederation, 456.
 debates on, 456, 457.
 foreign trade, 473, 479.

TRADE MARK—

defined, 664.

TRADE MARK CASES, 484, 664.

TRADE UNION TRUST CASE, 594.

TRAINS (see RAILWAYS).

TRANS-MISSOURI FREIGHT TRUST CASE, 584.

TRANSPORTATION RATES—

power of Congress over, 504.

TRANQUILLITY, INSURANCE OF DOMESTIC—

one of the objects of the Constitution, 102.

TREASON—

under the Articles of Confederation, 27.
 impeachment for, in England, 218-223.
 privilege of Congress does not extend to, 308.
 attainder for, forbidden, 733-738, 1155.
 attainder of Josiah Philips for, 735 n.
 cause for impeachment, 1027-1038.
 definition of, 1145-1147.
 Blackstone on, 1145 n.
 debate on, in Convention, 1146.
 levying war as, Marshall on, 1148.
 Curtis and Field on, 1149.
 conviction of, evidence necessary in, 1151.
 punishment for, 1154.
 corruption of blood, or forfeiture for, 1157.
 mitigation of punishment for, suggested by President Lincoln,
 1157, 1158.
 Randolph and Morris proposed definition of, 1223 n.

References are to pages.

TREASON (continued)—

- against a State, discussion of, 1225, 1226, 1227 n.
- early punishment of, in England and Colonies, 1473 n, 1510.
- Lord Ashley's speech on, 1487.

TREASURERS, PUBLIC—

- laws for relief of, unconstitutional, 828.

TREATIES—

- under the Articles of Confederation, 29.
- annexation and citizenship by, 152.
- naturalization by, 617.
- definition of, 763, 948.
- States forbidden to make, 763.
- made by Colonial Congress, 948, 949.
- treaty power considered in Constitutional Convention, 950.
- power of President and Senate to make, a compromise, 951, 952.
- views of Hamilton on, 952.
- Clifford, Justice, on, 955.
- Jefferson on, 956.
- power of House of Representatives to defeat, 957.
- Jay's treaty, 958-961, 965, 966.
- Alaska treaty, 961.
- Blaine on conflict between the Senate and House concerning, 962.
- Jefferson on relation of the House to, 964.
- McLean, Justice, on relation of House to, 964.
- extradition treaties, 1232.
- are supreme law of the land, 1325.
- Story on, 1329.

TRIAL, PUBLIC—

- guaranteed by Sixth Amendment, 1472-1489.
- definition of, 1476.

TRIALS—

- jury trial guaranteed, 1134.
- history of, 1135, 1138.
- by compurgation, 1135.
- by ordeal, 1136.
- by battle or duel, 1137.
- definition of, 1138, 1500.
- meaning of "crime," 1139.
- jury trial, origin of, 1140-1143.
- Wilson, Justice, on, 1161 n.
- speedy and public, 1472.
- in cases involving over twenty dollars right of jury trial guaranteed, 1490.

References are to pages.

TRIBUTE, 396.

TRICKETT, WILLIAM—

on annulment of laws, 1168 n, 1189.

on suits against a State, 1550.

TRIENNIAL ELECTIONS—

suggested for Representatives in Congress, 126, 127.

TRIPOLI—

treaty with, 1372 n.

TROOPS—

States not to keep in time of peace, 843.

quartering of, 1412.

TROY POUND—

established as standard mint weight, 640.

TRUMBULL, JONATHAN—

Speaker of the House of Representatives, 204.

member of committee on title for President, 852.

TRUMBULL, LYMAN—

on the Thirteenth Amendment, 1319.

on reconstruction, 1665 n.

TRUSTS—

federal laws and cases against, 581-596.

TUCKER, ST. GEORGE—

delegate to Annapolis Conference, 39, 41 n.

avored a President from each State, 859 n.

on power of Congress to abolish inferior courts, 1074.

on cases and controversies, 1103.

on express powers of Congress, 1525.

TURKEY—

compensation for private property taken for public use in, 1459.

TURNPIKES—

may charge for transporting mail over, 652.

TWELFTH AMENDMENT—

history of the, 1555, 1556.

manner of choosing electors under the, 1557.

election of electors by districts under the, 1558.

letter of Madison on district electors, 1558-1560 n.

References are to pages.

TWELFTH AMENDMENT (continued)—

- opposition of Gouverneur Morris to the, 1556-1558 n.
- election of President by House of Representatives suggested by Mr. Sherman, 1559.
- reasons for referring election of President to House of Representatives, 1560.
- origin of term "elector," 1562, 1563.
- Stevens on election of President, 1563 n.
- originally electors did not vote directly for President, 1563.
- under present provision they do, 1564.
- when House of Representatives elects President, 1565.
- electors not bound by Constitution to elect any particular person President, 1566.
- when election goes to House of Representatives choice must be made from the three candidates having the highest vote, 1567.
- Adams, J. Q., on election of President from three leading candidates, 1565 n.
- Gregg on election from the leading candidates, 1566 n.
- electors defined, 1567.
- how electors elected and number of, 1567.
- electors are not officers of United States, 1567.
- Miller on election of President, 1569 n.
- electoral vote, how counted, 1571.
- counting of first electoral vote, 1571 n.
- the electoral college a compromise, 1571.
- Roosevelt on decline of the electoral college, 1573.
- abolition of electoral college favored by Jefferson, Sumner and others, 1579 n.
- Story on the electoral college, 1580 n.
- Gregg on adoption of the, 1580 n.

TWELVE TABLES—

- law of, 624.

TWO BRANCHES OF CONGRESS—

- provision for, 122.

"TWO-THIRDS OF THAT HOUSE"—

- history of, 359-362, 366.

TYLER, JOHN—

- resigned as Senator from Virginia, 235.
- vetoed by, as President, 376.
- absences from the capital while President, 1011.

TYTHES, 386.

References are to pages.

U.

UNANIMOUS—

verdict of jury must be, considered, 1143.

UNCONSTITUTIONAL LAWS (see ANNULMENT OF LAWS).

UNIFORMITY—

of taxes, 406.

Story on, 406.

Miller on, 407.

UNION OF STATES—

Pelotiah Webster on, 81.

Noah Webster on, 82, 85.

Hamilton on, 86.

Madison on, 87.

“UNITED COLONIES”—

name for federal union in Franklin's plan of union, 21, 89, 1684.

“UNITED STATES OF AMERICA”—

title of government in the Articles of Confederation, 27, 1688.

UTAH—

statute of, on death penalty constitutional, 1512.

jury of eight in criminal cases in, constitutional, 1642.

V.

VACANCIES—

in House of Representatives, how filled, 199-201.

how caused, 202.

in Senate, how filled, 243, 246.

Senators appointed by governor in recess of legislature, 244.

Taney, Chief Justice, on, 988.

Stanbery on, 989.

“recess” defined, 990-995.

relation of President and Senate to, 995.

must be actual, 997.

in Presidency, 891-902.

VACCINATION (see POLICE POWER)—

laws on, 602.

VALLANDIGHAM, CLEMENT L.—

arrest and trial of, 726.

*References are to pages.***VAN BUREN, MARTIN—**

- vetoed no bills as President, 376.
- on obligation of contracts clause, 781 n.
- absences from capital while President, 1011 n.
- on power of Supreme Court, 1051 n.
- attributed Judiciary Act of 1789 to Hamilton, 1055 n.
- on Madison and first ten amendments, 1530, 1531.

VAN DEVANTER, JUDGE—

- on obligation of contracts, 797, 798.

VAN DYKE, NICHOLAS—

- signed Articles of Confederation, 1698.

VANE, SIR HARRY, 222, 223.**VARNUM, JOSEPH B.—**

- Speaker of the House of Representatives, 205, 237 n.

VATTEL, ———

- on public compacts, 845.

VENUE—

- in jury trials, 1143.

VERDICT OF JURY—

- must be unanimous, considered, 1143, 1493.

VERMONT—

- ratified first constitutional amendments, 1368.

VETO—

- power of President to, 353, 372, 376.
- origin of term, 353 n.
- Hamilton on, 354.
- in Rome, and in England, 353, 355, 362 n.
- by Queen Anne's, 355.
- by Colonial Governors, 355.
- by George III, 356.
- under Articles of Confederation, 356.
- proposed in Constitutional Convention by Gerry, 357.
- avored by Wilson and Hamilton, 357.
- opposed by Franklin, Mason and Sherman, 357, 358.
- object of, 361.
- by Governors of States, 363-366.
- Madison's letter to Clay on, 364 n.
- return of bill with, by President, 365, 366, 369.

References are to pages.

VETO (continued)—

- passage of bills over, 366.
- whether legislative or executive act, 371.
- should President give reasons for, 372-376.
- growth of veto power, 372-375.
- Webster and Miller on, 375.
- cannot be recalled, 375.
- attempts to abolish the, 376.
- Grant on, 376 n.
- of order or resolution, 377-379.
- Adams, John Q., on abuse of, 1035.

VETOES—

- number of, by Presidents, 376.

VICE-PRESIDENT—

- how term suggested, 250.
- presiding officer of the Senate, 250.
- Hamilton and Story on, 251.
- debate on, 251-254.
- Roosevelt on, 253, 254.
- has casting vote in Senate, 253, 976-978 n.
- does not preside at impeachment of President, 262.
- compensation of, 305.
- succession of to Presidency, 891, 895.
- not authorized to declare President's inability, 893.
- impeachment of, 1027-1037.
- election of, 1562-1579.
- acts as President when, 1564.
- when Senate can elect, 1564.

VINING, JOHN—

- member of committee to prepare amendments, 1365.

VIRGINIA—

- delegates from to first Colonial Congress, 2.
- instructions to delegates, 4.
- first to demand independence, 13.
- ratified the Articles of Confederation, 25, 1698.
- House of Burgesses of, demanded general trade laws, 39.
- commission from, appointed to Annapolis Conference, 41, 44.
- elected delegates to Constitutional Convention, 43.
- sent delegates to Alexandria Conference, 44, 45.
- instructed delegates to Constitutional Convention, 46.
- only two delegates from, in Constitutional Convention signed the Constitution, 65, 1347.

References are to pages.

VIRGINIA (continued)—

- criticism of Preamble of Constitution in Virginia Convention by Patrick Henry, 106.
- first Senators from, 225.
- debate in Virginia convention on election of Representatives, 271, 272.
- wheat suggested as compensation for members of Assembly in, 303 n.
- ceded land for District of Columbia, 696 n.
- attainder of Josiah Philips for treason in, 735 n.
- action of, on alien and sedition laws, 1177, 1178.
- ceded western lands to United States, 1256, 1258.
- ratified first ten amendments to Constitution, 1311, 1368.
- ratified the Constitution, 1345.
- speech of Patrick Henry on Bill of Rights in convention of, 1352 n.
- suggested Bill of Rights in amendments, 1363.
- suggested twenty amendments to the Constitution, 1363.
- demanding amendment for religious freedom, 1375 n.
- conflict over establishment of Episcopal Church in, 1375-1380.
- Madison's memorial on religious freedom in, 1377.
- Jefferson prepared act for religious freedom in, 1377-1380.

VOIR DIRE—

- juror examined on, 1477.

VON HOLST—

- on instructions of Senators, 273.
- on whether veto is legislative or executive act, 371.
- on impairment of obligation of contracts by Congress, 834.
- on treason against a State, 1227.

VOTERS FOR REPRESENTATIVES IN CONGRESS—

- qualifications same as for members of State legislatures, 132-140.
- efforts to limit qualifications for, to freeholders, 133-137.
- qualifications of, in Constitution, 137-140.

W.

WADE, BENJAMIN F.—

- president of Senate at time of impeachment of President Johnson, 218.

WADSWORTH, JERE—

- letter from, to Rufus King, on proposed action of Constitutional Convention, 51 n.
- 123

References are to pages.

WAITE, CHIEF JUSTICE—

- on natural born citizens, 151, 1620.
- on commerce, 495-497.
- on the telegraph as an instrument of commerce, 505.
- on common carriers, 531.
- on colored passengers, 563.
- on bankruptcy, 633.
- on the law of nations, 675.
- takes testimony of President Grant in trial of Secretary Babcock, 1025 n.
- on cases under laws of the United States, 1095.
- on original jurisdiction of the Supreme Court, 1125.
- on privileges and immunities of citizens, 1208.
- on treaties, 1261.
- on right of petition, 1406.
- on suits against States, 1545.
- on protection of property, 1624.
- on the Fifteenth Amendment, 1672.

WALKER, JUDGE—

- on division of legislative power, 114.
- on the veto power, 375.
- on inferior tribunals, 1065.
- on treason against a State, 1225.

WALSH, ROBERT—

- letter of Madison to, on history of slave clause in Constitution, 715.

WALWORTH, JUDGE—

- on the first ten amendments, 1532.

WALTON, GEORGE—

- refused to serve in Constitutional Convention, 64.
- signed Articles of Confederation, 1698.

WAR—

- under the Articles of Confederation, 28, 29, 676.
- power of Congress to provide for defense in time of, 419, 431.
- power to declare, rests in Congress, 676-680.
- Pinckney and Hamilton favored conferring power to declare, on Senate, 677.
- Gerry and Madison favored conferring power to declare, on the President, 677, 678.
- declaration of, how made, 680.
- right to confiscate property in time of, 680.
- power to raise armies during, 681.
- States prohibited from engaging in, 848.

References are to pages.

WAR (continued)—

- war power of President, 913-918.
- quartering troops in time of, 1412.
- destruction of property in time of, 1460.

WAR OF 1812—

- declared by Act of Congress, 680.

WAR WITH MEXICO—

- declared by resolution of Congress, 680.

WARSHIPS—

- States forbidden to keep in time of peace, 843-845.

WAR POWER—

- of President, 913 n.
- Adams, John Q., on, 913 n.
- slavery abolished under, 913.

WAR TAXES—

- history of, 176.

WARD, SAMUEL—

- member of first Colonial Congress, 1.

WARRANTS, SEARCH—

- must be issued on oath or affirmation, 1414-1430.

WARWICK, EARL OF—

- trial of, for treason, 219.

WASHBURN, ELIHU B.—

- member of Reconstruction Committee, 1597.

WASHINGTON, GEORGE—

- delegate to first Colonial Congress, 2.
- elected commander in chief of the army, 12, 26.
- on inefficiency of second Colonial Congress, 32.
- on weakness of Confederation, 33.
- visited by Alexandria Commissioners, 44, 45 n.
- avored control of commerce by Congress, 45.
- Jay's letter to, on call for Constitutional Convention, 49.
- reply of, to Jay, 50.
- elected president of the Constitutional Convention, 57.
- suggestions of Madison to, concerning a Constitutional Convention, 87.
- John Adams on influence of, with Senate, 227 n.
- claimed Senate was a compromise between the States, 234.
- opposed instructing representatives, 236 n.
- first inauguration of, 278 n.
- avored annual meetings of Congress, 279.

References are to pages.

WASHINGTON, GEORGE (continued)—

- on money bills originating in House of Representatives, 348 n.
- first veto of, 372.
- vetoed by, 376.
- Madison's letter to, suggesting the veto power, 377 n.
- avored a national university, 611 n.
- urged uniformity in national currency, 639.
- encouraged arts and sciences, 661.
- on size of the army, 685 n.
- title proposed for, as President, 853 n.
- second "swearing in" as President, 909.
- cabinet meetings of, 927.
- consulted with cabinet, 927 n.
- House of Representatives requested Jay treaty papers of, 958-961.
- consulted Hamilton concerning transmission of papers to House, 959.
- action of, concerning transmission of papers to House, 959-961.
- transmitted papers concerning St. Clair's defeat to House, 965, 966.
- selection of cabinet officers by, 977 n.
- on power of removal from office, 981.
- annual address of, to Congress, 1000.
- absences from capital while President, 1010 n.
- asked Congress to establish a court to try prize cases, 1040, 1041, 1044.
- appointed members of first Supreme Court, 1055 n.
- letter of, to Chief Justice Jay, 1056.
- signed Constitution, 1346, 1347, 1770.
- letter of, transmitting the Constitution to Congress, 1772.

WASHINGTON, JUSTICE—

- on foreign commerce, 480.
- on ex post facto laws, 742.
- on obligation of contracts, 790-794, 799.
- on privileges and immunities of citizens, 1212-1218.

WASHINGTON CITY—

- establishment and government of, 695-699.

WATERWAYS—

- power of Congress over, 499-502.

WAYNE, JUSTICE—

- on power of courts to annul laws, 1184.

WEBSTER, DANIEL—

- on the excellence of the addresses of the first Colonial Congress, 10.
- on the division of the powers of government, 111 n.

*References are to pages.***WEBSTER DANIEL** (continued)—

- on the expiration of the terms of Congress, 278.
- on use of the veto power, 375.
- on gold and silver as legal tender, 446.
- on regulation of commerce, 461, 470 n, 485 n.
- on the legislative power of Congress, 709.
- comments on Charles River Bridge case, 812, 813 n.
- on President's power of removal from office, 980, 982.
- on power of courts to annul laws, 1190 n.
- on the "law of the land," 1450.

WEBSTER-ASHBURTON TREATY—

- naturalization under, 617.

WEBSTER, NOAH—

- on a plan for a Constitution, 82.
- credits Madison with first public proposal of a Constitution, 85.
- secures passage by Congress of first copyright law, 659, 660.

WEBSTER, PELATIAH—

- credited by Madison as the first to suggest a Constitution, 81, 82.
- outlines of his plan for a Constitution, 81.
- Hannis Taylor on, 81 n.

WEIGHTS AND MEASURES—

- power of Congress to fix standard of, 634.

WELCH, JUDGE—

- on the Bible in the public schools, 1389-1392.

WELDON, JUDGE—

- on trade with the Indians, 516, 517.

WELFARE, GENERAL—

- its promotion a purpose of the Constitution, 103.
- power of Congress concerning, 382, 385.
- Monroe on, 392.

WENTWORTH, JOHN, JR.—

- signed the Articles of Confederation, 1697.

WENTWORTH, SIR THOMAS, 222.**WEST, BENJAMIN**—

- refused to serve in Constitutional Convention, 64.

WEST INDIES—

- included in Franklin's plan of union, 22, 166.

References are to pages.

WEST VIRGINIA—

admission of to the union, 1251.

WESTERN LANDS—

discussed, 25, 1256, 1258.

WHARTON, FRANCIS—

on extradition, 1232.

WHARVES—

control of Congress over, 500.

WHEAT—

proposed by Madison as standard of compensation for Congressmen, 303.

proposed by Jefferson as standard of compensation for members of the Virginia Assembly, 303 n.

WHIPPING—

not cruel punishment, 1512.

WHIPPLE, WILLIAM—

commissioner on Pennsylvania-Connecticut dispute, 1049.

WHITE, JOHN—

Speaker of the House of Representatives, 205.

WHITE, JUSTICE—

on privilege of members of Congress, 322.

on taxes, 404, 405.

on duties, 408.

on power of courts to annul laws, 1191.

on full faith and credit clause, 1202.

WHITNEY, E. B.—

on the judges in *Hylton v. United States*, 183 n.

WIGFALL, L. T.—

expelled from Senate, 289.

WIGMORE, JOHN H.—

on witnesses to treason, 1152.

WILEY, JUDGE—

on privilege of members of Congress, 318.

WILKINSON, JAMES, GENERAL—

suspended writ of habeas corpus, 731.

WILLIAM III—

vetoes by, 355, 362 n.

References are to pages.

WILLIAM III (continued)—

granted bill of rights, 1352, 1355.
declaration of rights read to, 1505.

WILLIAMS, GEORGE H., ATTORNEY GENERAL—

opinion, on when Representative becomes a member of Congress, 340.
member of Reconstruction Committee, 1597.
relation of, to the Fourteenth Amendment, 1601-1604.

WILLIAMS, JOHN—

signed the Articles of Confederation, 1698.

WILLIAMSON, HUGH—

delegate to Constitutional Convention, 61.
opposed creating the office of Vice-President, 253.
proposed three-fourths vote to overrule a veto, 360.
opposed reelection of President, 869.
opposed election of President by legislature, 879.
member of Grand Committee on State Debts, 1323 n.
favored a jury trial in civil cases, 1352.
signed the Constitution, 1348, 1771.

WILLIS, C. B., JUDGE—

on the King giving testimony, 1022 n.

WILSON, HENRY—

on the Fifteenth Amendment, 1669.

WILSON, JAMES F.—

author of bill to abolish slavery, 1582.

WILSON, JUSTICE—

opposed Declaration of Independence, 20.
delegate to Constitutional Convention, 62.
signed Declaration of Independence, 64.
favored annual elections for Representatives in Congress, 127.
favored popular vote for Representatives in Congress, 131, 133.
favored proportional representation, 166.
on direct tax, 170.
opinion in *Hylton v. United States*, 182, 182 n.
opposed voting by States in Senate, 232.
on vacancies in Senate, 243.
on Congressmen holding other offices, 331, 332.
favored money bills originating in Senate, 346.
favored absolute veto by President, 357.
on veto power in England and the Colonies, 362 n.
on duties and imposts, 386.

References are to pages.

WILSON, JUSTICE (continued)—

- opposed issuing paper money, 411, 413.
- advocated canals to the West, 571-573.
- avored a single President, 855-857.
- avored three-year term for President, 867.
- avored election of President by the people, 876, 877.
- subsequently favored election of President by electors chosen by lot, 878, 879.
- on treaties, 950, 951.
- member of Committee on Judiciary, 1040.
- member of Court of Appeals, 1043 n.
- appointed to supreme bench, 1055 n.
- on tenure of judges, 1070.
- on judicial power of the United States, 1160 n.
- on annulment of laws, 1180 n.
- author of clause guaranteeing republican form of government, 1282, 1284.
- opposed oaths of allegiance, 1333.
- on omission of a Bill of Rights in the Constitution, 1354.
- on suits against States, 1541.
- avored election of electors by districts, 1558.

WILSON, WOODROW—

- on amending the Constitution, 1309 n.

WINTHROP, ROBERT C.—

- Speaker of the House of Representatives, 205.

WINGATE, PAINE—

- member of the first Senate, 225.
- avored Senate passing upon removals from office, 878.

WIRT, WILLIAM, ATTORNEY GENERAL—

- on vacancies in recess of Senate, 989.

WISE, JOHN S.—

- on qualifications of voters, 1616, 1653.

WITHERSPOON, JOHN—

- signed the Articles of Confederation, 1698.

WITNESSES—

- at impeachment trials, 214.
- before congressional committees, 286.
- President cannot pardon, for contempt, 943.

WOLCOTT, OLIVER—

- signed the Articles of Confederation, 1697.

References are to pages.

WOMEN—

transportation of articles made by, regulation of, 523, 533.
regulation of hours of labor for, by Congress and States, 606, 1629.
patents secured by, 662 n.

WOODESON—

on English law, 741.

WOODSON—

on impeachment, 209, 210.

WOODS, JUSTICE—

on imprisonment for debt, 826.

WRIT OF ELECTION—

when to be issued, 199, 203.

WRIT OF HABEAS CORPUS—

discussed, 721-734.

WRITS OF ASSISTANCE—

discussed, 1415, 1418.

WYTHE, GEORGE—

member of second Colonial Congress, 26.
signed Declaration of Independence, 20, 26.
delegate to Constitutional Convention, 63, 64.
failed to sign the Constitution, 65.
member of committee on judiciary, 1040 n.

Y.

YATES, ROBERT—

delegate to Constitutional Convention, 61.
withdrew as delegate from the Convention, 64, 65.
member of Committee of Eleven, 76, 233 n.
did not sign the Constitution, 1350.

YEAS AND NAYS—

required in passing bill over veto by Congress, 353, 367, 368.
when calling of, compulsory, 295.
Miller, Justice, on, 295.

YEARLY MEETINGS OF CONGRESS—

suggested by Charles Pinckney, 275.
Washington on, 279.

Z.

ZANE, JUDGE—

on appropriation of private property by the government, 1464.
defined "taken" under the Fifth Amendment, 1464.

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